20

LAW OF TORTS,

AND THE

MEASURE OF DAMAGES.

A

MANUAL

OF THE

LAW OF TORTS,

AND OF THE

MEASURE OF DAMAGES.

BY

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Injuria ex eo dicta est, quod non jure fiat: omne enim quod non jure fit, injuria fieri dicitur.—ULPIAN.

If men will multiply injuries, actions will be multiplied too, for every man that is injured ought to have his recompense.—*Lord Holt in Ashby v. White.*

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PREFACE

TO THE FOURTH EDITION.

In preparing this edition I have endeavoured to introduce or refer to all the decisions bearing upon the subject, which have been reported since the publication of the third edition. There will also be found references to several important enactments which have recently come into force. Many material alterations and additions have in consequence been introduced into the present edition, though I have striven to combine with accuracy of statement as to the result of cases, and with completeness of reference in the foot notes, that brevity and freedom from the mere details of cases which should distinguish a manual from a formal treatise.

CHARLES COLLETT.

1st *February* 1877.

PREFACE

TO THE SECOND EDITION.

As I stated in my Preface to the first edition, I undertook to prepare this little book in order to supply a test-book on the Law of Torts, and of the Measure of Damages, for candidates for the offices of Principal Sadr Amin, District Munsiff, and Pleader in a Civil Court. These were the two titles of law on which, for the purposes of the examination, it was thought desirable to have a separate manual, and it was proposed to me that I should prepare one. It was required that I should state also the rules as to the measure of damages in actions on contracts ; and hence I have treated the subject of damages in a separate chapter ; whereas if I had been writing merely a manual of the Law of Torts, I should have closed my notice of each instance of a tort with some remarks on the damages to be awarded in respect to it. The book is now a test-book in the Madras Presidency in the examination for the offices abovementioned.

I have now cited in foot notes the authorities upon which each section is founded. This has added to the bulk of the book, but it has remedied what seems to have been thought a defect in the first edition. I have tried to limit the citation of cases to those commonly referred to by treatise writers, and I may remind the young student that by looking up the case cited by me in the table of cases in any larger work, he will be guided to the place where the author treats of the same subject. I have also preferred to cite the more modern cases if equally in point, because, as the

practitioner knows very well, in the report of a modern case there will generally be found references to prior cases of the same class. Further, all quite recent cases of importance will, I think, be found duly referred to. I was forced to limit the citation of cases as much as possible, and this is how I have tried to make a limited citation as useful as possible.

I have, of course, been greatly assisted in this compilation by various treatises; but it is needless to give here a long list of the names of the authors whose works I have consulted, as I believe the names are all mentioned in the foot notes.

To those for whom especially I have prepared this manual, it may not be superfluous to say that though I hope my little book will always be useful to them, I equally hope that they will not rest satisfied with it as sufficient for them. A manual, if a good one, will be useful as an introduction for the student, and will be a handy book on the spur of the moment for the practitioner; as Bacon said of a book of Institutes on the law generally, "the office thereof is to be a "key and general preparation to the reading of the course. "And, principally, it ought to have two properties; the one a "perspicuous and clear order or method; and the other, an "universal latitude or comprehension, that the students may "have a little prenotion of everything, like a model towards "a great building." I may well rest satisfied if I shall be found to have attained to this standard of usefulness.

CHARLES COLLETT.

MADRAS,
April, 1866.

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A MANUAL

OF THE

LAW OF TORTS, &c.

CHAPTER I.

INTRODUCTORY.

Meaning and definition of Tort.

1. Tort is a term of art in English law. The word means that which is wrested or crooked, and so that which is contrary to right.[1] A tort has been described by one English statute as a wrong independent of contract.[2] It may be described as an invasion by A of B's rights, either of property, person, liberty or reputation.[3]

Definition of delicts in Roman law.

2. The Roman law called such wrongs, delicts, and they have been defined as spontaneous, that is, free or voluntary actions or omissions contrary to law.[4] The wrong being an act which is against right or law, the obligation to make reparation for the damage, arises from the fault, and not from the intention; and conversely, a thing which is not a legal injury or wrong, is not made actionable by being done with a bad intent.[5] But it will be seen that, in many cases, to consti-

1 Co. Litt. f. 158; Tomlin's Law Dict. *Tort* is still in common use in French, but *délit* is their technical term equivalent to our term *tort.*

2 C. L. Pro. Act, 1852, Schedule B. 25.

3 10 Law Magazine, 4.

4 Bowyer's Civil Law, 264.

5 Bowyer's C. L. 262; Broom's Com. 689; Stevenson *v.* Newnham, 13 C. B. 285.

tute an act a legal wrong or injury, the existence of a malicious intention is essential.[1] Where an act, in itself indifferent, if done with a particular intent becomes wrongful, there the intent must be proved and found ; but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant ; and in failure thereof the law implies a wrongful intent.[2]

General principle of the law of torts.

3. Hence negligence or imprudence may render a man responsible ; and the principle pervading the law of torts is, that all persons are responsible for all the natural and legal consequences resulting from acts or omissions by them in violation of the rights of others.[3] If the state of facts is such that an action is maintainable, although there be neither malice nor fraud, the plaintiff is not bound to prove either, though both be alleged, and may recover on the liability which the facts disclose, though both fraud and malice be disproved.[4]

Ingredients in a tort.

4. Thus, there are two ingredients in a tort ; the *injury* or legal wrong which is always essential ; and the *damage* which is generally present, and sometimes said to be essential.[5]

Damage without injury.

5. Damage without injury is never actionable. To set up a shop in opposition to another, may cause loss of custom, and so damage, but is not actionable : but to drive away customers by threats or by publishing defamatory statements regarding a man's

1 Broom's Com. 740 : on the distinction between intention and motive, see Lindley's Juris. XXX.

2 Rex. *v.* Woodfall, 5 Burr. 2667.

3 10 Law Mag. 12.

4 Swinfen *v.* Chelmsford, 5 H. and N. 890.

5 On the subject of injury and damage, see Ashby *v.* White, 1 Sm. L. C. 185 (4th ed.) ; Broom's Com. 74 ; Norton's Topics of Juris. 102.

trade, is actionable.[1] So, every man has a right to derive the fullest benefit from that which is his, though the exercise of his right may be contrary to the interests of another; thus, he is not liable though, by digging in his own ground, he causes a spring in his neighbour's ground to dry up.[2] But no man ought to choose a mode which is prejudicial to others, of doing what he has a right to do, when he can derive the fullest benefit from his right without damaging any one; thus, a right of passage over another's land ought not to be used so as to cause damage, when its use in a different manner would be as beneficial, and cause less or no damage.[3]

Injury without damage.

6. But injury though without damage is actionable; or rather an injury imports damage though there is no pecuniary loss, and actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to show the violation of a right, in which case the law will presume damage.[4] Thus a trespass on another's land may cause no actual damage; and generally wherever any act injures another's right, and would be evidence in future in favour of the wrongdoer, an action may be maintained for an invasion of the right without proof of any specific damage.[5] So, where the roof of a house projects over another man's land, the drip of the rain water is taken to be damaging previous to evidence thereof.[6] When it is said that, in some cases, it is necessary to prove both the injury and the special damage, it would be more correct to say that, in such cases, the injury consists in the special damage; thus, a public nuisance constitutes no private in-

1 Addison on Torts (2d ed.) 10.
2 Acton *v.* Blundell, 10 M. & W. 324.
3 Bowyer's C. L. 262; and see Beardmore *v.* Tredwell, 7 L. T. (N. S.) 207.
4 Ashby *v.* White, 1 Sm. L. C. 185.
5 Harrop *v.* Hirst, L. R. 4 Exch. 47.
6 Fay *v.* Prentice, 1 C. B. 828.

jury unless there is special damage, that is, till then, there is no injury in respect to individuals, but only to the community. So it is sometimes said that there may be both injury and damage, and yet no action: it is more accurate to say, that what is an injury when done by one person, is not always a legal wrong or injury, if done by another; thus, moderate correction by a schoolmaster is not a legal wrong, though it would be an assault between other parties; so an arrest by a policeman, or imprisonment by a magistrate may not be actionable, though precisely the same acts, if done by a private person, would be so. So it is said that there may be both an injury and damage, but there will be no action if the damage is too remote; it is more correct to say, that there is then no legal connection between the two: thus, if A slanders B, and C, believing it, beats B, the damage therefrom is, in respect to A, one without injury.[1]

Tort distinguished from crime,

7. A tort must be distinguished from a crime, and from a pure breach of contract. Most public crimes involve a private injury and damage; but the English rule is that, to prevent the compounding of felonies, the right to sue for the private injury is, in a case of felony, suspended till the wrongdoer has been tried for the public offence.[2] But in cases of misdemeanor it is not so, and the criminal and civil remedies may be pursued concurrently, or the one before or after the other.[3] And even as to felonies, the suspension of the civil remedy is only as between the party injured and the felon himself, and there may be an action by or against a third party, as a *bonâ fide* purchaser, or pledgee.[4] And as to the felon,

1 Ashby v. White, 1 Sm. L. C. 221.

2 Stone v. Marsh, 6 B. & C. 551; Crosby v. Leng, 12 East, 413; Wellock v. Constantine, 9 Jur. N. S. 232.

3 Broom's Legal Maxims, 196.

4 White v. Spettigue, 13 M. & W. 603; Lee v. Bayes, 18 C.B. 599; Osborn v. Gillett, L. R. 8 Exch. 88.

the remedy is only suspended, and after he has been tried, he may, whether acquitted or convicted, be made civilly liable;[1] and the amount stolen by one who has robbed his master, is such a debt as to be a good consideration for the assignment of his property before conviction to the party robbed.[2]

7, *a*. The English rule is not followed in America; and there, whatever the offence, the civil remedy may be pursued before, after, or concurrently with, the criminal prosecution.[3] In India the distinction of felonies and misdemeanors is not now known; and the English rule may be imputed to certain special reasons, and scarcely rests on sound principles; but as yet there has been no authoritative decision whether it would now be followed in India.[4] By s. 1, Act 13 of 1855, there may be a civil action against one, who has caused the death of another by negligence, though the causing of the death may amount to felony or other crime. Certainly as to minor offences, as assault, &c., the civil remedy is not suspended; and, generally, a previous criminal prosecution is no defence to a subsequent civil action for the same injury; but it may be so by special enactment as by the Madras Police Act 24 of 1859, s. 53; or in England by the Statute 9 Geo. 4, c. 31, s. 27.

and from a mere breach of contract.

7, *b*. A tort may consist of a breach of duty consequent upon some contract. Where there is an express promise, and a legal obligation results from it, the action for a breach will be founded on contract.

1 Crosby *v.* Leng, 12 East, 409.

2 Chowne *v.* Baylis, 8 Jur. N. S. 1028; on compounding offences, see I. P. C., s. 214.

3 1 Hilliard on Torts (2d ed.) 66—76; Sedgwick on Damages (5th ed.) 30, 539.

4 See a *dictum* of Peacock, C. J. that the rule does not apply in India, 6 Calc. W. R. 9 Civil References. See Wells *v.* Abraham, L. R. 7 Q. B. 554, where the rule was practically useless.

But where from a given state of facts, the law raises a legal obligation to do a particular act, then although there is a promise implied by law to do the act, yet on a breach and consequential damage, an action as for a tort is the more appropriate form of action.[1] The negligence of a bailee may be viewed as a tort, or as a breach of contract; but such an act as non-payment for goods sold is a mere breach of contract. So where there is an employment which creates a duty, a breach of the duty may be treated as a tort.[2] For neglect or unskilfulness a surgeon engaged to treat a patient, may be sued as for a tort. Practically the distinction is not often important where forms of action are disregarded. But where the substantial ground of action is contract, the plaintiff cannot, by suing as for a tort, render a person (*e. g.* a minor,) liable, who would not have been liable on his promise.[3]

Torts how classified.

8. Torts may be classified in respect to their nature, or in respect to their objects. The first mode of division is essential for their apprehension and analysis. The latter is more convenient for the purpose of enumerating the various instances of torts.

In respect to their nature, of three classes.

9. In respect to their nature, torts may be divided into, FIRST, the invasion of some general legal right, or *jus in rem* of[4] the plaintiff; or, SECONDLY, the violation of some duty towards the public productive of special damage to the plaintiff; or, THIRDLY, the violation of some private duty or obligation productive likewise of damage to the plaintiff.[5]

1 Burnett *v.* Lynch, 5 B. & C. 609.
2 Courtenay *v.* Earle, 10 C. B. 83.
3 Jennings *v.* Rundall, 8 T. R. 335.
4 3 Austin's Juris. 190.
5 Broom's Com. 659, 661, 676.

FIRST CLASS; invasion of a general right.

10. In the first class of cases a plaintiff may be called upon to show two things, viz., the existence of the right alleged, and its violation. The existence may admit of easy proof by reference to legal principles; thus, proof of the possession of goods gives a right of action as against a wrongdoer for an invasion thereof.[1] So, trespass will lie for a mere entry upon land in possession of another; but a reversioner must show that the injury is such as necessarily to damage also his estate, otherwise in fact there is no invasion of his right or interest.[2] In other cases the existence of the right may have to be deduced with difficulty from general doctrines as to the law, public policy, or the intention of the legislature; such as the right to running or under-ground streams, the right in trade-marks, and so on.[3] But generally in this class of cases, the existence of the right being established, an action may lie for the invasion of the right without proof of actual or specific damage.

SECOND CLASS; breach of public duty with special damage.

11. In the second class of cases the plaintiff must prove, (1) the existence of the public duty, (2) its breach, and (3) the special damage resulting to himself therefrom. The duty may consist either in refraining from, or in doing, acts of a particular kind or tendency; but wherever a duty has to be observed towards the public by an individual, and another is specially injured in consequence of the non-observance or non-discharge of such duty, or through misfeasance or malfeasance in its discharge, an action will lie at suit of the latter party against the former.[4]

1 Armory *v.* Delamirie, 1 Sm. L. C. 256; Nelson *v.* Cherrill, 8 Bing. 316.

2 Broom's Com. 659; Bedingfield *v.* Onslow, 3 Lev. 209.

3 Broom's Com. 660.

4 Broom's Com. 661.

12. The duty may exist at common law, that is, arise out of the acknowledged doctrines of universal though unwritten law, (public nuisances are generally breaches of duty of this nature); or its existence may depend upon the words, spirit, or purview of some express enactment.

Existence of such duty.

13. Thus, it is a principle of such common law that wherever an instrument, dangerous in its existing state, and calculated to inflict damage on those who may come in contact with it, is so placed as to be likely to cause damage, the person thus placing it is liable, if damage ensues, to the party injured.[1] But where an individual suffers wrong, or sustains damage from the breach of a public duty only in common with other members of the community, no personal right of action thence occurs though he may suffer more frequently or more severely than others. It is only where he suffers some special damage, differing in kind from that which is common to others, that a personal remedy accrues to him.[2] Thus, all who use a public road suffer from an obstruction of it, and those who must use it most, suffer the most frequently, but all suffer in common; but where one suffers specially, as by tumbling into a ditch dug across the road, or over heaps of stones illegally deposited on it, and breaking his arm, he then has a personal right of action against the wrongdoer.[3]

At common law.

14. Hence, if the danger and impediment to the public do not, under any circumstances, constitute a breach of public duty, no action

Duty as well as damage must be shown.

1 Broom's Com. 662; Scott *v.* Shepherd, 1 Sm. L. C. 210.

2 Broom's Com. 663; Wilkes *v.* Hungerford Market Co., 2 Bing. N. C. 281; Henley *v.* Mayor of Lyne Regis., 2 Cl. & Fin. 331; Winterbottom *v.* Derby, L. R. 2 Exch. 316.

3 Soltau *v.* DeHeld, 2 Sim., N. S. 143; and see 1 Hilliard 79.

would be maintainable for particular damage resulting to an individual, for the plaintiff must show a breach of public duty as well as special damage to himself.[1] But the damage, and not the breach of duty, is that for which the plaintiff sues,—his object being, not to vindicate a right on behalf of the public, but to recover compensation for a wrong done to himself.[2] It is a breach of public duty for a witness duly summoned not to attend, but to sustain an action against such witness, the plaintiff must have incurred some cost or damage, and have had a good cause of action in the original suit; otherwise no damage could have been sustained by him through the witness's default.[3]

Public duty by express law.

15. But a duty towards the public may be imposed, in part or wholly, by express enactment: then the words of the statute must be narrowly examined; the duty may consist in doing or abstaining from some particular act. That an individual should have an action for non-performance of the duty, it is essential that the breach of duty should be coupled with consequential special damage to him. A penalty or remedy for non-performance, may, or may not, be expressly provided. When a statute gives a right, or imposes a duty, then, although in express terms it has not given a remedy, the remedy which by law is properly applicable to that right, follows as an incident; that is, a party specially injured shall have an action for damages.[4] Thus, the Indian Railway Act (Act 18 of 1854, s. 19) requires that where high roads cross the line, the company shall put up sufficient gates, and keep

1 Brown *v.* Mallett, 5 C. B. 920.

2 Broom's Com. 666.

3 Cauling *v.* Cox, 6 C. B. 703; where the witness has contracted to appear, see Yeatman *v.* Dempsey, 6 Jur. N. S. 778.

4 Braithwaite *v.* Skinner, 5 M. & W. 327; Ashby *v.* White, 1 Sm. L. C. 185.

them properly closed. If the gates are not so kept, and A's cattle, being lawfully on the high road, stray on to the line, and are killed by a train, A shall have an action for damages.[1]

Where there is a penalty or express remedy by such law.

16. Where an Act specifies a penalty for non-performance of the new duty, then it must be seen whether such penalty is declared to be recoverable by the party aggrieved by the non-performance, or whether otherwise there is a specific remedy for infringement of the right or duty provided by the Act. If so, that remedy is the only one available. But if a penalty is recoverable in the case of a breach of the public duty, though no damage may actually have been sustained by any body; then the right of an individual to maintain an action in respect of a special damage, is not thereby taken away.[2] Thus, where an Act imposes a penalty on the master of a cooly emigrant ship, for not carrying a proper supply of medicines, or a duly qualified surgeon, then such penalty being leviable for mere non-performance, if A can show that he has suffered specially therefrom, he may have an action for such damage. But where the duty is imposed with the object of preventing a mischief of a particular kind, and by the neglect of it, a person suffers a loss of quite a different kind, he is not thereby entitled to an action.[3]

Where there is no remedy at all.

17. The general rule is that where authority is given by the legislature to do an act, parties injured by the doing of it have no legal remedy, (the act having been done in a lawful manner), but should appeal

1 Fawcett *v.* York, &c. Ry. Co., 16 Q. B. 610.

2 *per* Campbell, C. J. in Couch *v.* Steel, 3 E. & B. 413; Atkinson *v.* N. & G. Waterworks Co., L. R. 6 Exch. 404.

3 Gorris *v.* Scott, L. R. 9 Exch. 125.

to the legislature.[1] For where the damage is such as naturally arises from the powers given, and was necessarily contemplated when those powers were given, and when it is not caused by any want of care by the donees of the powers, no action at all will lie. The remedy, if any, must be under any clauses providing for compensation.[2]

18. In the third class of cases, or torts founded upon some breach of a private duty, the plaintiff will in like manner have to show, (1) the existence of the duty, (2) its breach, and (3) the consequential damage. So that here, as in the second class, there is, correctly speaking, no injury unless there is special damage. The duty may exist at common law, by some express enactment, or by reason of some contract.[3]

THIRD CLASS; breach of private duty with special damage.

19. A duty at common law may be said to be private, when it and the correlative right have relation to a limited number of persons only, and not to the community generally. Such are the duties and rights which are said to exist by reason of vicinage, as the right of support for land by adjoining land, the right to a running stream in a pure state, or the duty of not creating a private nuisance. In some cases there will, from the nature of the object, be at once a perceptible damage, but

Private duty at common law.

1 Mersey Docks *v.* Gibbs, L. R. 1 H. L. 112; and see Ricket *v.* Metrop. Ry. Co., L. R. 2 H. L. 175, and Beckett *v.* Midland Ry. Co., L. R. 3 C. P. 82, as to what is an injury within the compensation clauses of the English Acts; see also Brand *v.* H. and C. Ry. Co., L. R. 4 H. L. 171, and Queen *v.* Metrop. B. W., L. R. 4 Q. B. 358; Metr. B. W. *v.* McCarthy, L. R. 7 H. L. 243.

2 See *dictum* of Blackburn, J. in Reg. *v.* Darlington Bd., 10 Jur. N. S. 1198; Pilgrim *v.* Southampton Ry. Co., 7 C. B. 226 For liability in cases of improper use of powers, see Clothier *v.* Webster, 9 Jur. N. S. 231; Bagnall *v.* London, &c. Ry. Co., Id. 254; Reg. *v.* Bradford Navigation, 11 Jur. N. S. 766; and see Atty.-General *v.* Hatch, L. R. 4 Ch. 146; Dume *v.* Birmingham C. Co., L. R. 8. Q. B. 49, and 7 Q. B. 244.

3 Broom's Com. 676.

without such actual damage there will be no injury. Thus, there is no injury if a stream is so used as to flow on without material diminution or alteration to inferior riparian proprietors.[1] So, to constitute a private nuisance, the inconvenience must be such as materially interferes with the ordinary comfort, physically, of human existence, and not merely is offensive to dainty notions of living.[2] This class is thus distinguished from the first class of torts. A man's right to his person, liberty, or reputation, or the uninterrupted possession of his property, is one he enjoys in relation to all the world, and so, from every invasion of such right, damage, though not perceptible, is generally presumed.

—by express law.

20. So, sometimes a private duty may exist by virtue of an express enactment; thus, a railway company may be guilty of a wrongful act of omission in not registering the plaintiff's name as a shareholder, and of a wrongful act of commission in declaring his shares to be forfeited. The damage then is the deprivation of the ordinary privileges of a shareholder, and the contingent loss of profits.[3] If a statute prohibit the doing of some act affecting the public, there must be some special damage to give a right of action to a particular person. But where an act prohibited by a statute is obviously prohibited for the protection of a particular party, there it is not necessary to allege special damage, for then the statute has created a right, and the case falls within the first class.[4]

1 Embrey *v.* Owen, 6 Exch. 70; Chasemore *v.* Richards, 5 Jur. N. S. 873.

2 Walter *v.* Selfe, 4 DeG. & S. 323.

3 Catchpole *v.* Ambergate Ry. Co., 1 E. & B. 111.

4 Chamberlaine *v.* Chester Ry. Co., 1 Exch. 876.

21. But very often the private duty exists by reason of a contract, or springs out of the relation consequent upon that contract. It is not then always easy to distinguish whether the injury is a tort or a breach of contract, and sometimes it may be treated as either.[1] There is a duty of the master to his servant existing by reason of the contract of employment, and the negligence of the master causing damage to the servant, is a tort very distinguishable from such a mere breach of contract as the refusal to pay the wages agreed upon. But if a surgeon is employed to attend a man, and by his unskilfulness hurts and damages his patient, this may be viewed either as a breach of the implied contract for reasonable skill, or as a tort by reason of the breach of duty cast upon professional men, as solicitors, surgeons, engineers and artificers, to possess and exercise a reasonable amount of skill, and in whom the want of such skill is reckoned as a fault.[2] So, the duty may be consequent upon a contract, though there is no privity of contract between plaintiff and defendant; thus, if A contracts with B to carry his servant C by mail coach, or with B, a surgeon, to treat his friend or servant C, and C suffers from the negligence of the carrier or surgeon, C may have an action for the tort against B; though there is no privity of contract between C and B.[3]

—by reason of a contract or employment.

22. Where C maliciously procures or persuades A to break his contract with B, then B may have an action against C, and recover substantial damages;[4] but this case really falls within the first class, since the right of B invaded, is a

1 On this, see ante § 7, b.
2 Brown v. Boorman, 11 Cl. & F. 44; Howard v. Shepherd, 9 C. B. 319.
3 Marshall v. York Ry. Co., 11 C. B. 655.
4 Lumley v. Gye, 2 E. & B. 216.

general right good against all, that third parties not interested, should not interfere between him and those with whom he specially contracts about any matter.[1]

23. It has been held that where a banker, having sufficient funds, refuses to cash a cheque of a customer, the latter may have an action in tort without showing special damage.[2] There is no doubt that the refusal is a breach of contract entitling the customer to an action without proof of damage. Practically the distinction as to the form of action, would not be important in India.

Limit where there is no privity of contract between the parties.

24. But it is not every violation of a duty imposed by contract, for which a third party, without privity of contract, may have a remedy, by an action in tort, against the wrongdoer; such a doctrine would lead to serious consequences.[3] Thus, if C, the servant of A, has a contract with B, and B, by his negligence, hurts C and so A loses his services, the only remedy is that of C against B, but A cannot sue B for the loss of C's services.[4] If A sells an article to B knowing that it is also intended to be used by C, and falsely represents to B that it is fit for such use, and may be safely used, and C, on the faith of such warranty, and believing it to be true, uses the article, and sustains damage, he may have an action in tort against A.[5] The principle is, that if a falsehood be knowingly told, with an intention that another person should believe it to be true, and act upon it, and that person has acted upon

1 See 2 Austin's Juris. 31, 48.

2 Marzetti v. Williams, 1 B. & Ad. 415.

3 Priestley v. Fowler, 3 M. & W. 1.

4 Alton v. Midland Ry. Co., 11 Jur. (N. S.) 672; S. C. 19 C. B. (N. S.) 213; Collis v. Selden, L. R. 3 C. P. 495.

5 Langridge v. Levy, 2 M. & W. 519; George v. Skivington, L. R. 5 Exch. 1.

it, and thereby suffered damage, the party telling the falsehood, is responsible in damages.[1]

25. But there must be both such intention, and also fraud on the part of the defendant to render him liable. If A builds a mail cart for the Post Master General, and B horses it, and hires C to drive it, and from a defect in the building, the cart breaks down, C cannot sue A for any damage he may sustain.[2] This case must though be distinguished from where the liability is consequent upon a special private duty by law imposed upon a party, when neglect without fraud will be sufficient; as where C suffers damage from the neglect of a surgeon, or common carrier of passengers, an action will lie, though C may not himself have made any contract with such surgeon or carrier.[3]

Essentials when no privity of contract.

26. Where there is a privity of contract between the plaintiff and the defendant, there are two classes of cases in which the remedy of the plaintiff for damage from a breach of duty arising out of the contract, is properly an action in tort, viz., (1) where the damage is caused by negligence, and (2), where it is consequent upon fraud. It is obvious that such an injury is a tort, and is very distinguishable from a mere breach of contract.

Where there is privity of contract.

27. In the first class the principle is, that the confidence induced by undertaking any service for another, is a sufficient legal consideration to create a duty in the performance of it. This

First, where the injury is founded on negligence.

1 Longmeid *v.* Holiday, 6 Exch. 761; Geehard *v.* Bates, 2 E. & B. 488.

2 Winterbottom *v.* Wright, 10 M. and W. 109.

3 Gladwell *v.* Steggall, 5 Bing. N. C. 733.

extends even to where the service is rendered gratuitously, for then the party, if he has once entered upon it, is liable for negligence in performing it.[1] This class will be found to be very extensive, and includes torts arising out of bailments, and founded upon negligence.

Secondly, where it arises from fraud.

28. The second class is also numerous, and includes what are called actions for deceit. The general rule is, that there must be fraud and deceit in the defendant, and damage to the plaintiff; but no benefit need accrue therefrom to the defendant.[2] Still simple fraud gives no cause of action unless the plaintiff can show damage.[3] There has, though, been not a little discussion as to what representation will amount to such fraud, and whether legal, without moral fraud, is sufficient: the better opinion seems to be that moral fraud in a representation is essential, in order thereby to furnish a ground of action.[4]

Torts classed according to their objects.

29. Such is the classification of torts in regard to their nature, and it is obvious that it will generally be very important, in considering any particular instance of tort, to determine under what class the alleged injury in question can be said to fall. In enumerating the ordinary kinds of torts, it will though be a more convenient arrangement to class them according to their objects, that is, according as they concern, *first*, the person and personal rights; or *secondly*, property whether real or personal, classing torts to real property separately from torts to personal property. But the in-

1 Coggs *v.* Bernard, 1 Sm. L. C. 147.

2 Wild *v.* Gibson, 1 H. C. L. 605.

3 Pasley *v.* Freeman, 2 Sm. L. C. 62.

4 See notes to Pasley *v.* Freeman; and see Chitty on Contracts, (7th ed.) 613.

stances of torts included in each of these three classes in regard to their objects, will, as far as possible, be treated of in the order of their classification in respect to their nature.

Torts out of Contract
- Privity between pltff and defdt
  - Negligence – Bailments & negligence –
  - Fraud – Action for deceit
- No privity
  - Special private duty – Mere negligence will do – Surgeon, Carrier, &c – a fortiori Fraud
  - No special private duty – Fraud is necessary – Langridge v. Levy – Mere Negligence will not do – [illegible] Case – Servant Contract – [illegible] Case –

Where there is privity may sue either in tort or Contract – Brown v. Boorman

In pure tort no privity necessary – Langridge v. Levy

Ex. of third parties where there is no fraud & no special duty – Longmeid v. Holliday

CHAPTER II.

TORTS TO THE PERSON AND PERSONAL RIGHTS.

30. This class of cases will include injuries to a man's person, liberty, or reputation. Bodily injuries may be either direct, as assault, when they are invasions of a general right, and fall within the first class of torts in respect to their nature; or they may be consequential, as resulting from negligence, when they constitute a breach of some public or private duty.[1]

Bodily injuries are direct or consequential.

31. Bodily injury, though the consequence of a lawful act or a mere mischance, may be a tort, and the existence of an evil intention in the mind of the wrongdoer is not essential.[2] So much so, that even a lunatic will be civilly answerable for his torts, though wholly incapable of design.[3] The question of the intention of parties is never a question of law, but of fact.[4] It is immaterial whether the act be wilful or not; to constitute a defence it must be shown that the injury was inevitable, and utterly without the defendant's fault.[5] But as to criminal liability, it may be most material whether an act causing bodily injury, was or was not, purposely done to effect that end.[6]

Evil intention not essential.

1 Broom's Com. 689.
2 1 Selwyn's N. P. 28.
3 Broom's Com. 690; Sedgwick on Dam. 518.
4 *per* Williams, J. in Blyth *v.* Dennett, 22 L. J. 79 C. P.; and see 1 Hilliard, 104.
5 1 Selw. N. P. 27, 28.
6 Broom's Com. 690.

32. Pure trespass to the person is where an assault or battery is committed. Every attempt, or offer with force to hurt another, is an assault; to hold up the fist near enough to strike,—to present a gun when within range,—to shake a whip in a man's face,—and, generally, a threat of violence exhibiting an intention to assault, and a present ability to carry the threat into execution,[1]—will, in law, constitute an assault. But otherwise a mere threat of violence is not an assault;[2] and if words are used at the time shewing an intention not to commit present violence, though the gesture may be threatening, it is no assault.[3] The least unlawful touching of another's person, wilfully or in anger, is a battery, and every battery includes an assault.[4]

ASSAULT and BATTERY defined.

33. To touch a man in order to draw his attention to something,[5] or to push gently (but not rudely or violently), through a crowd is not an assault.[6] So nothing done with another's permission is an assault, as where, in sport, parties struggle together.[7] But to strike another through carelessness and negligence, though unintentionally, is an assault, but not if the act was unavoidable, and the conduct of defendant without fault.[8] If a policeman handcuffs an unconvicted man, where there is no attempt to escape, and no reason to fear a rescue, it is an assault.[9] To spit upon a man,[10] or throw water or dirt upon him,[11] or to strike his horse so that it run away and

Examples.

1 Addison, 481; Read *v.* Coker, 13 C. B. 860; 1 Hilliard, 200.
2 Cobbett *v.* Grey, 4 Exch. 744; 1 Hilliard, 198.
3 1 Hilliard, 200; Addison, 482.
4 Addison, 483; 1 Selw. N. P. 27.
5 Coward *v.* Baddeley, 4 H. and N. 481; 28 L. J. 261 Exch.
6 Cole *v.* Turner, 6 Mod. 149.
7 Cristopherson *v.* Hare, 11 Q. B. 477.
8 Addison, 320, 483.
9 Wright *v.* Court, 4 B. & C. 596; 1 Hilliard, 236.
10 Reg. *v.* Cotesworth, 6 Mod. 172.
11 Pursell *v.* Horn, 8 Ad. & E. 604.

throw him, is an assault and battery.[1] An action for assault and battery lies not only against him who commits the injury, but against him also at whose command it is done, and that whether the command is directed against a particular person by name, or by an illegal order against a class of persons of whom the plaintiff is one.[2] Thus it may lie against a railway company for the act of their servant.[3] If A requests B to remove one making a disturbance from his house, A is not responsible for excess of violence used by B.[4]

Defences—force used in self-defence.

34. There are various defences to justify the use of force, which must, however, be no more than is reasonably necessary for the purpose.[5] Thus, in self-defence, if one being struck, in the heat of anger returns the blow, it is excusable, but when the danger, or impulse of the moment, is past, he must not afterwards, to revenge himself, strike his former assailant.[6] But a man ought not, in the case of a small assault, to give a violent or unsuitable return; for, hitting a man a little blow with a little stick on the shoulder, is not a reason for him to draw a sword,. and cut and hew the other.[7] In like manner one may justify an assault and battery in defence of his wife, child, or servant. So a wife may justify in defence of her husband, a child of a parent, and a servant of his master. But in such cases also the act must not have been by way of revenge, but in order to prevent an injury.[8]

35. If one man enters the house of another with force

1 Dodwell *v.* Burford, 1 Mod. 24.
2 Selw. N. P. 28.
3 Eastern C. Ry. Co. *v.* Broom, 6 Exch. 314; Goff *v.* G. Northern Ry. Co., 30 L. J. 148 Q. B.
4 Pidgeon *v.* Legge, 5 W. R. 649.
5 Gregory *v.* Hill, 8 T. R. 299.
6 Reg. *v.* Driscoll, 1 Car. & M. 214.
7 *per* Holt, C. J. in Cockcroft *v.* Smith, 11 Mod. 43.
8 1 Selw. N. P. 32.

—in defence of house, &c.

and violence, the owner may justify in turning him out without a previous request to depart; but if he enters quietly, he must be first requested to retire before hands can be lawfully laid upon him to turn him out.[1] If an assault follows, and a policeman sees it, he may take the intruder into custody; or, at the request of the owner, turn him out; but he need not do this, for it is not part of his duty.[1] A shop-keeper is not bound to sell goods at the prices marked on them, and if one enters a shop, and insists on having the goods, and refuses to leave, the shop-keeper may, after request to depart, use force to turn out the disorderly person.[2] So, an inn-keeper may turn out a disorderly person, though there is no actual breach of the peace.[3] If a tenant holds over, but is in fact in possession, the landlord cannot use force to turn him out. But if the tenant voluntarily leaves the premises vacant, the landlord may enter, and then the tenant may not re-enter, but may be turned out by force.[4]

—in defence of goods.

36. So, with regard to a forcible seizure of goods and chattels, wherever force is used to gain possession of a thing, the force may be opposed by force without more ado, although the party using the force, has a right to the possession he seeks to acquire.[5] A servant, after request and refusal to deliver, may justify the use of force to recover possession of his master's goods which a wrongdoer is removing, no needless

1 Wheeler *v.* Whiting, 9 C. and P. 265; Polkingham *v.* Wright, 8 Q. B. 206.
2 Timothy *v.* Simpson, 6 C. and P. 500.
3 Howell *v.* Jackson, 6 C. and P. 725.
4 Browne *v.* Dawson, 12 Ad. and E. 629.
5 Green *v.* Goddard, 2 Salk., 641; Addison on T. 485.

violence being used.[1] But when the removal is perfected, neither master nor servant ought to be allowed to justify a breach of the peace to enforce their rights.[2]

37. But sometimes the use of force in the first instance is justifiable, as the moderate correction of a pupil, an apprentice, or a son under age.[3] So, the captain of a vessel may justify an assault on his crew or passengers, to prevent mutiny and disorder.[4] So, if one comes up in the midst of an affray, and forcibly interferes to separate the parties, it is no assault on his part, unless needless violence is used.[5] Generally a previous criminal prosecution is no defence to a subsequent action for the same assault; but it may be so by special enactment, as in some cases in England, and as in the case of a police officer by the Madras Police Act, 24 of 1859, s. 53.

Force when justifiable.

38. The circumstances of time and place, as when and where the insult was given, require to be taken into consideration. It is a greater insult to be beaten in a public place than in a private room.[6] Provocation may be shown by way of mitigation; or that the blow was unintentional and an apology was offered; so, previous threats by the defendant may be proved as an aggravation of the assault.[7] If two assault another, and one beats violently and the other a little, each is responsible for all the damage received from both; and the criterion of the damage is the injury sustained, and not the

Facts to be regarded.

1 Blades *v.* Higgs, 7 Jur. N. S. 1289.
2 *per* Tindal, C. J. in Antony *v.* Haneys, 8 Bing. 192.
3 Selw. N. P. 34; Addison, 511.
4 Noden *v.* Johnson, 16 Q. B. 218.
5 Timothy *v.* Simpson, 6 C. & P. 500.
6 Tullidge *v.* Wade, 3 Wils. 18.
7 Addison, 517; 1 Hilliard, 206.

act or motives of the most guilty, or the least guilty of the defendants.[1] Probable future damage should be considered, for if the plaintiff has once recovered for an assault, though it be slight, he can have no fresh action for a subsequent new damage resulting from the same act.[2]

39. False imprisonment, or the unlawful detention of a man's person, is an invasion of his general right of liberty. Any the least confinement, as forcibly detaining a man in the public street, will be an imprisonment. Actual contact is not necessary, but any restraint put upon the freedom of another, by show of authority or force, is sufficient.[3] If a person is commanded by a constable to go with him, and the order is obeyed, and they walk together in the direction pointed out by the constable, that is constructively an imprisonment, though no actual force be used.[4] But if a person knowing of the issue of process, goes voluntarily, without a command, and without any, even the slightest compulsion, this is not an arrest.[5] False imprisonment may also arise from the arrest or detention of the person by an officer without a warrant, or by an illegal warrant, or by a legal warrant executed at an unlawful time.[6]

FALSE IMPRISONMENT.

40. A private person may, to preserve the public peace, restrain one whom he sees breaking it, as long as it is necessary for that end. So, he may stop an affray whilst going on, but

When a private person may arrest another.

1 Clerk *v.* Newsam, 1 Exch. 131.

2 Fetter *v.* Beale, 1 Ld. Raym. 339, 692.

3 Addison, 487 ; 1 Hilliard, 223.

4 Grainger *v.* Hill, 4 Bing. N. C. 212 ; Bird *v.* Jones, 7 Q. B. 748.

5 Arrowsmith *v.* Le Mesurier, 2 N. B. 211 ; Berry *v.* Adamson, 6 B. and C. 528.

6 Addison, 487 ; 2 Selw. N. P. 922.

after it is really over, and the affrayers are dispersed, or have run off, they cannot be lawfully pursued, and taken by constables, or given in custody by a private person, there being no danger of a renewal.[1] Merely making a noise and disturbance is not a breach of the peace.[2] But if a man stops before the door of a dwelling-house or shop, applying abusive and opprobrious epithets to the inmates, and attracts a crowd, and refuses to desist when requested, he commits a breach of the peace.[3]

Dangerous lunatics.

41. So, a dangerous lunatic, who seems disposed to do mischief to himself or to any other person, may be confined by a private person, the restraint being necessary both for the safety of the lunatic, and the preservation of the public peace.[4] But an action for false imprisonment will lie for giving a child under seven years of age, into custody on a charge, of an offence, as a child of that age is incapable of crime.[5]

Arrest by private person in cases of felony.

42. The English law divides crimes into felonies and misdemeanors. A private person being present when a felony is committed, not only legally may, but ought to arrest the offender, or aid in so doing.[6] He may even break into a private house in order to prevent the commission of a felony.[7] So, though he was not present, if he can prove that a felony has actually been committed, and can also show facts, such that any reasonable person acting without

1 Price *v.* Seeley, 10 C. and F. 39.

2 Wheeler *v.* Whiting, 9 C. and P. 262; *s. v.* Howell *v.* Jackson, 6 C. and P., 723.

3 Cohen *v.* Huskisson, 2 M. and W. 477.

4 Addison, 496.

5 Marsh *v.* Loader, 14 C. B. (N. S.) 535; I. Penal Code, s. 82.

6 Broom's Com. 726; I. Penal Code, s. 79, illus; s. 105 Cr. Pro. C.

7 Handcock *v.* Baker, 2 B. and P. 260; Smith *v.* Shirley, 3 C. B. 142.

passion or prejudice, would fairly have suspected the other party, he may justify his having arrested, or caused the imprisonment of the other.[1] When such facts are proved, it is for the Judge to determine, whether or not they amount to reasonable and probable cause, not for suspecting, but for imprisoning the person.[2] Section 100 Cr. Pro. C. rather strictly limits the power of a police officer to make an entry into a house in order to effect an arrest.

In cases of misdemeanor.

43. But a private person may not, of his own authority, arrest another for a misdemeanor, except for a breach of the peace going on.[3] A private person renders himself liable for the consequences, by directing a policeman to take another into custody.[4] In a doubtful case he should not do so, but state the matter to a Magistrate; and if he does this without malice, he will not be liable for the arrest by order of the Magistrate, though no offence has been committed.[5]

Arrest by constable for misdemeanors.

44. As to misdemeanors, a constable has no greater powers. He may arrest a breaker of the peace in his view, or on an assault in his view he may arrest the offender at the time, or recently, that is, as soon after as he conveniently can.[6] If the assault has ceased and there is no danger of its renewal, the power to arrest is gone.[7] So, if one stands in his way so as to hinder him in preventing a breach of the peace, he may take such person into custody, but will not be justified in giving him a blow, or in handcuffing him.[8]

1 Allen *v.* Wright, 8 C. and P. 526.

2 West *v.* Baxendale, 9 C. B. 152.

3 Addison, 490.

4 Warwick *v.* Fuller, 12 M. and W. 509.

5 Stonehouse *v.* Elliott, 6 T. R. 315; The Marshalsea Case, 10 Rep. 68, *b.*

6 Reg. *v.* Light, 27 L. J. 1 M. C.

7 Reg. *v.* Marsden, L. R. 1 C. C. R. 131.

8 Levy *v.* Edwards, 1 C. & P. 40.

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45. As to felonies, a constable has greater inherent power than a private person.[1] Thus, he need not, to justify himself, prove that a felony had actually been committed, but if he has reasonable cause to suspect that a person (not being an infant under the age of 7 years, incapable of committing felony)[2] has committed a felony, he may detain such person, and bring him before a Magistrate.[3] There being reasonable cause to suspect, the question of reasonable necessity for immediate arrest to prevent an escape is, it seems, a matter entirely for the decision of the officer, and at his discretion.[4] So, when he acts upon a charge made to him by one person against another, it should be reasonable. There is no fixed rule as to what is a reasonable ground of suspicion. A charge may be reasonable or unreasonable, with reference to the circumstances and character of the party making it, or of the party charged. A constable, though he ought to be protected in the execution of his duties, ought also to be guided by ordinary reason, care, and caution.[5] Still, if one charges another with felony, and desires a constable to take him, and he do so without a warrant, he is not responsible for the imprisonment, though the charge is false, and no felony had been committed.[6] It would be most mischievous, that, (the charge being apparently reasonable), the constable should be bound first to try, and, at his peril, exercise his judgment on the truth of the charge. He that makes the charge, alone is answerable.[7]

In cases of felony.

1 4 Bl. Com. 292.

2 Marsh *v.* Loader, 14 C. B. (N. S.) 535 ; I. Penal Code, s. 82.

3 Beckwith *v.* Philby, 6 B. & C. 635 ; Buckley *v.* Gross, 32 L. J. 129 Q. B.

4 1 Hilliard, 234.

5 Hogg *v.* Ward, 3 H. and N. 417 ; 27 L. J. 443 Exch.

6 Hale P. C. 177 ; Davis *v.* Russell, 2 M. and P. 607.

7 *per* Lord Mansfield in Samuel *v.* Payne, 1 Doug. 360.

46. But where a felony has been committed in the house of A, and he sends for a policeman and states circumstances of suspicion, and the policeman, on enquiry, arrests B, and desires A to come to the station-house, and sign the charge sheet against B, and A does so, A is not responsible for the imprionment; as charging a person with an offence, is a different hing from giving him into custody. The arrest and detenion are then the acts of the policeman, but A might have een liable, if he had acted with bad faith, or maliciously, ut not otherwise.[1] But the giving into custody induces ability; and the signing of a charge sheet by a person is *rimâ facie* evidence against him that he ordered and directed he arrest.[2] If signing the charge sheet was essential to the etention of the plaintiff, and the defendant signed with hat knowledge, he is responsible for the imprisonment. ut charging or signing a charge sheet is not an inception f a malicious prosecution, where a ministerial and not a idicial officer is thereby set in motion; it is only evidence f a false imprisonment.[3]

Charging with offence and giving in custody distinguished.

47. If an arrest by a constable is, in its inception, wrongful, all other constables who aid and assist in the continuance of the wrongful imprisonment, are responsible for the entire damage thereby caused to the plaintiff, lthough they had no knowledge of the unlawfulness of the nprisonment, and intended to act in strict discharge of

Liability of ose who conue an imprinment originly wrongful.

1 Grinham *v.* Willey, 4 H. and N. 499; 28 L. J. 242 Exch.

2 Harris *v.* Diguum, 29 L. J. 23 Exch.

3 Austin *v.* Dowling, L. R. 5 C. P. 540.

their official duty.[1] Every unlawful detainer of a prisoner after he has gained a right to a discharge, is a fresh imprisonment.[2]

Arrest of the wrong person.

48. If there is ground to arrest A, and B says he is A and is arrested, there is no injury. But after he has given notice that he is not A, he cannot lawfully be detained for a greater length of time than may be reasonably necessary to ascertain the truth.[3] If A in answer to inquiries gives information which he believes to be true, but does not himself put the officers of justice in motion, he is not generally liable, though the officers, acting upon his information, arrest a wrong party. But the character of the information, and the degree of active interference, may induce liability; for there are statements which no man ought to make, and there is information which no person ought to give, without ascertaining beforehand whether it be true or false.[4]

Arrest under a warrant—liability.

49. Where a person is arrested under a warrant or other process of a Court, the ministerial officer is in India, and generally in England, protected by special enactment. Act 18 of 1850 provides, that, where a judicial officer has acted in good faith believing himself to have jurisdiction, no officer of any Court or other person bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector, or other person acting judicially, shall be liable to be sued in any Civil Court, for the

1 Griffin *v.* Coleman, 4 H. and N. 265; 28 L. J. 134 Exch.; seems to overrule Bowditch *v.* Fosberry, 19 L. J. 339 Exch.

2 Edgell *v.* Francis, 1 M. and Gr. 222.

3 Dunston *v.* Paterson, 2 C. B., N. S. 495; 26 L. J. 267 C. P.

4 Addison, 506.

execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same. Otherwise, the general rule is, that where the Court had jurisdiction of the matter, and, in disposing of it, has merely acted erroneously, then the party who put the Court in motion, or the officer who executes the process, will not be liable for an action. But where the Court had no jurisdiction in the matter, the whole proceeding is one by an incompetent authority, and the parties above specified may be liable to an action for false imprisonment under the process of the Court.[1] This rule, though modified, as above, in respect to ministerial officers, may still apply to private parties.

Arrest without warrant by police officers in India.

50. Such are the principal rules of the English law. The Indian Penal Code uses only the word offence, and makes no such division of crimes as into felonies and misdemeanors. But in respect to grave offences and outrages, especially upon the person, and affrays and assaults whilst in progress, the principles of the English law ought to be applied to a private person arresting another. The power of police officers under the Code of Criminal Procedure seems much less clear. The provisions of the Code are contained in Sections 92. to 103.[2] Offences are divided into those for which an officer shall not, or for which he may arrest without warrant. There is a long schedule of these, which an officer had better commit to memory, as no very apparent principle governs this division of offences. The Code seems to have rendered the law rather uncertain.

1 The Marshalsea Case, 10 Rep. 68, b; 76, a; Howard *v.* Gosset, 10 Q. B. 359; Watson *v.* Bodell, 14 M. & W. 57.

2 As to possession of the warrant at the time of arrest, see s. 176 and Codd *v.* Cabe, 1 Exch. D. 352.

Arrest under civil process in India.

51. As to arrest under civil process, the Code of Civil Procedure (s. 79) allows a person improperly arrested on mesne process, to apply to the Court for compensation, but he may bring his action for the injury. Generally as to ministerial officers executing process, Act 18 of 1850 applies. If the process is feigned, forged, or simulated, and is not the process or order of the Court, it is a mere nullity, and the officer can derive no protection from the piece of waste paper.[1] But if it is genuine, though void in form, he is protected, since it is not for him to examine the judicial act of the Court.[2] It has been held in England that an arrest under civil process will be illegal if the officer has not the warrant in his possession at the time; and if, after arrest, he refuses to produce it, the detention will be illegal.[3] If a first arrest be a false imprisonment by the wrongful act of the officer, no subsequent conduct or act of his can legalize the continuance by him of that imprisonment.[4] The party is entitled to be set at large before he can be taken on other valid process in the officer's hands.[5] Where an officer in the position of a Sheriff makes a false return (as of a rescue) which is conclusive as to the facts stated in it, so that plaintiff is arrested in consequence, the officer is liable in damages for the misfeasance without proof of malice or want of probable cause.[6]

Arrest of privileged persons.

52. If a person privileged from arrest under civil process, as a witness in attendance under the process of a Court, or an accused person attend-

1 Hooper v. Lane, 6 H. L. C. 443.
2 Countess of Rutland's Case, 6 Rep. 54 a.
3 Galliard v. Laxton, 8 Jur. N. S. 642.
4 Humphrey v. Mitchell, 3 Scott, 51.
5 Eggington's Case, 2 E. and B. 728; Hooper v. Lane, 6 H. L. C. 497; 27 L. J. 75 Q. B.
6 Brasyer v. Maclean, L. R. 6 P. C. 398.

ing on bail at the hearing of a criminal charge against himself,[1] is taken upon valid process, the writ protects the officer, and the witness should apply to the Court, under whose authority he has been compelled to appear as a witness, to discharge him from custody.[2] But if a party, knowing of the privilege, yet causes the arrest to be made, he would be liable; and it may be doubted if an officer, who acts when having such knowledge, ought to be protected; but it has been held that he would be.[3]

When a private person interfering becomes liable.

53. A party may render himself liable, by either himself personally, or by his vakeel or agent, interfering in the execution of process by an officer. If he has merely set the Court in motion, he is no trespasser;[4] but if he, or his agent takes upon himself to give wrong directions, or by word or act induces the officer to seize the wrong person, he is responsible.[5] So if A gives B into custody and a Magistrate remands B, this is the act of the Magistrate, and damages cannot be given against A for the remand;[6] but in a suit for malicious prosecution it would be properly taken into consideration in assessing the damages. The officer who, by inadvertence or mistake, arrests, under legal process, a wrong party (that party not having contributed to the mistake and having given notice of it), is responsible; as are also all persons who interfere in any way, by giving directions or assistance, or officiously volunteering information to the officer, leading to the mistake.[7]

1 Gilpin *v.* Cohen, L. R. 4 Exch. 131.

2 Magnay *v.* Burt., 5 Q. B. 395.

3 1 Hilliard, 232; 2 Selw. N. P. 1078; 2 Taylor on Evid. § 1208.

4 Carratt *v.* Morley, 1 Q. B. 28; Brown *v.* Chapman, 6 C. B. 365.

5 Lowell *v.* Champion, 6 A. and E. 417; West *v.* Smallwood, 3 M. and W. 418.

6 Lock *v.* Ashton, 12 Q. B. 871.

7 Jarmain *v.* Hooper, 7 Sc. N. R. 663.

Exemplary damages when given.

54. Where trespasses of a serious nature have been committed by officers of the law under colour of legal process, exemplary damages are recoverable. Violent and illegal conduct on the part of officers charged with the execution of legal process, is calculated to lead to dangerous conflicts.[1]

Liability of a gaoler for false imprisonment.

55. A gaoler who receives a prisoner under a warrant, is not responsible in damages if the warrant has been irregularly issued; but if the wrong man has been arrested and brought to him, or the warrant is altogether void and a mere nullity, he will be responsible for the detention, though he had no means of ascertaining the identity of the party brought to him with the person named in the warrant.[2] But if the party thus wrongfully arrested does not, when brought to the gaoler, complain of the wrongful arrest, or give the gaoler any means of ascertaining that he is not the person named in the warrant, nominal damages only would be recoverable.[3]

Liability of judicial officers for false imprisonment.

56. As to judicial officers the rule is, that no suit can be brought against any Judge, when acting judicially in a matter within his jurisdiction, for any error or mistake in doing or omitting any act;[4] and it is not allowable for a plaintiff to aver that any judicial act was done maliciously, that is, intentionally in violation of the law.[5] But if a judicial officer does any act beyond the limit of his authority causing injury

1 Brunswick *v.* Sloman, 8 C. B. 331.

2 Aaron *v.* Alexander, 3 Camp, 34; Griffin *v.* Coleman, 28 L. J. 134 Exch.

3 Addison, 571.

4 Doswell *v.* Impey, 1 B. and C. 169; Miller *v.* Leare, 2 W. Bl. 1141.

5 Grosewelt *v.* Burwell, 1 Ld. Ray. 454. See the elaborate judgment of Kent. C. in Jates *v.* Lansing, 2 Hilliard, 173—180; id. 194.

to another, he will be liable.[1] Still a Judge with limited jurisdiction, is not liable for acting without jurisdiction, unless he had the knowledge or means of knowledge of which he ought to have availed himself, of his want of jurisdiction; and it lies upon the plaintiff in every such case, to prove that fact.[2] Where the facts, if true, would have given jurisdiction, his immunity cannot depend upon their being true or false, and he is not liable though they be found afterwards to be false;[3] but if he mistake the law as applied to those facts, and decide that he has jurisdiction where clearly he has no pretence for it, he will (at least by English law) be liable.[4]

56, *a*. In England, under 11 and 12 Vict. ss. 1, 2, the rule in respect to Justices of the Peace is, that if the act is done without jurisdiction, it is a trespass; if within the jurisdiction, the right of action depends upon the corruptness of the motive, and it must be proved that the act was done maliciously and without reasonable and probable cause.[5] In India the protection is greater and includes acts done in good faith, though without jurisdiction. Act 18 of 1850 enacts that, "no Judge, Magistrate, Justice of the Peace, "Collector or other person acting judicially, shall be lia- "ble to be sued in any Civil Court for any act done, or "ordered to be done by him in the discharge of his ju- "dicial duty, whether or not within the limits of his "jurisdiction; provided that he at the time, in good faith,[6]

1 Doswell *v*. Impey. 1 B. & C. 169.
2 Calder *v*. Halket, 2 Moore I. A. C. 309, 310.
3 Houlden *v*. Smith, 14 Q. B. 852; Taylor on Evid. § 1484.
4 Houlden *v*. Smith supra; Wingate *v*. Waite, 6 M. & W. 746.
5 Taylor *v*. Nesfield, 3 E. & B. 724; Paley on Conv. (5th ed.) 450—74.
6 For a definition of 'good faith,' see Penal Code, s. 52.

"believed himself to have jurisdiction to do or order the "act complained of."

57. These words, wide as they are, can scarcely be taken to excuse culpable negligence, or gross ignorance, or incompetency. They ought to be limited to where a judicial officer exercising ordinary reason, care, and caution, has yet erred in judgment, and acted without jurisdiction. It is not because a Magistrate chooses to think himself acting under a statute, that he can by such mere fancy of his own protect himself in an action.[1] Thus, where a Magistrate acts without those circumstances which must concur to give him jurisdiction, as where he grants a warrant without information, upon a supposed charge of a heinous offence, he ought to be liable.[2] So, where he commits a person for re-examination for an unreasonable time.[3] So, a Magistrate is not at liberty to detain a known person to answer a charge not yet made against him; though it might be otherwise as to a mere vagabond.[4] So, a Magistrate will be guilty of an assault and false imprisonment, and responsible in damages, if he tries to force a party who has appeared to answer a complaint, to agree to an arrangement, by threatening that he will otherwise convict him, and giving him into the custody of a Constable.[5] In India, a Magistrate investigating a charge on which he has power only to commit for trial, is not a Judge; and an improper remand or refusal of bail would not seem to be a judicial act, but would be actionable, at least on proof of malice.[6]

Where they will be liable.

1 Cann v. Clipperton, 10 A. and E. 582; Calder v. Halket, 2 Moore I. A. C. 307; Taylor on Evid. § 294. See also Sheshaiyangár v. Raganatha, 5 Mad. H. C. R. 345.

2 Morgan v. Hughes, 2 T. R. 225.

3 Davis v. Capper, 10 B. & C. 28.

4 Rex v. Birnie, 1 M. & R. 160.

5 Bridgett v. Coyney, 1 M. & R. 211.

6 Penal Code, s. 19, Ill. (d); s. 193, Expl. 2; Linford v. Fitzroy, 13 Q. B. 240, shews that the rule is

58. Judicial functions cannot be delegated, and if it has been the practice of a particular Court to delegate to its clerk, the performance of judicial acts, the practice is illegal, and the clerk who thus takes upon himself the office of Judge, is responsible for the orders he gives. If he takes upon himself to issue a warrant without the order or direction of the Judge, he is liable for the trespasses occasioned by its execution.[1] But a clerk signing orders in the course of his duty, is not liable unless there is a total absence of jurisdiction on the part of the Judge.[2] So, a Magistrate is bound himself to hear the witnesses and determine the case; if, therefore, depositions are taken by the Magistrate's clerk, in the absence of the magistrate, and the Magistrate proceeds to act upon depositions so taken, he acts entirely without jurisdiction; there is no proper charge before him, and if he directs the imprisonment of the person accused by them, he is responsible for a trespass.[3] So, a Magistrate ought never to execute his office in his own case, or where he has an interest,[4] but cause the offender to be carried before some other justice.[5] But if he is assaulted, he may commit the offender for trial; or, if he be insulted, or otherwise interrupted in the execution of his office, he may proceed against the party under ss. 435—438 of the Code of Criminal Procedure.

Liability where judicial functions have been delegated.

59. In England the rule seems to be, that where the action is brought against a Justice of the Peace for acts done without, or in excess of his jurisdiction, the conviction or order

Where a Magistrate or other officer acts maliciously.

otherwise in England. See also Paley on Conv. (5th ed.) 20 note (k) as to what acts are judicial and what ministerial.

1 Andrews *v.* Morris, 1 Q. B. 3; Whitelegg *v.* Richards, 2 B. and C. 45.

2 Dews *v.* Riley, 11 C. B. 434.

3 Caudle *v.* Seymour, 1 Q. B. 892.

4 Wildes *v.* Russell, L. R. 1 C. P. 722.

5 *per* Holt, C. J. Anon, 1 Salk. 396.

must first have been quashed ; but not where the action is for a malicious conviction, or other malicious abuse of the functions of his office ; and it will be necessary, if the Magistrate had jurisdiction in the matter, to show that he acted maliciously, and without reasonable and probable cause.[1] On principle this rule would seem equally applicable in India, when it is sought, notwithstanding Act 18 of 1850, to make a judicial officer liable for his acts ; and even where it is shown that he acted without jurisdiction, the burden would still seem to be upon the plaintiff to show that the judicial officer did not act in good faith within the meaning of the Act.[2] The question whether a Magistrate has acted in the discharge of his duty with good faith, and with reasonable and probable cause, is a question of law for the decision of the Judge.[3]

MALICIOUS CONVICTION and malicious prosecution distinguished.

60. There is a wide distinction between an action against a prosecutor for a malicious prosecution, and an action against a Magistrate for a malicious conviction, and imprisonment thereunder. In the former case, proof that there was, in reality, no ground for imputing the crime to the plaintiff, shows that the prosecution was instituted without probable cause, and malice may be inferred from thence ; but in an action against a Magistrate for a malicious conviction, the question is, not whether there was any actual ground for imputing the crime to the plaintiff, but whether, upon the hearing, there appeared to be none. The plaintiff must prove a want of probable cause for the conviction, which he can only do by proving what passed upon the hearing before the Magistrate, when the conviction took place. The Magistrate has nothing

1 11 and 12. Vict. c. 44, ss. 1, 2.
2 Calder *v.* Halket, 2 Moore I. A. C. 310.
3 Kirby *v.* Simpson, 10 Exch. 367.

to do with the guilt or innocence of the offender, except as they appear from the evidence laid before him. The conviction must be founded on that evidence alone, and it is impossible to show that there was no probable cause for the conviction, without showing what that evidence was. There may be a malicious prosecution without a malicious conviction, and there may be an unfounded conviction by the Magistrate without malice.[1]

Objections to jurisdiction.

60, *a.* So when an objection is taken that goes to oust the jurisdiction of a Magistrate, as where a claim of title is set up, it is for the Magistrate to decide whether the objection is *bonâ fide,* or merely frivolous, and he is not responsible unless it be shown that he acted maliciously and without reasonable and probable cause in holding the objection to be frivolous.[2] But a Magistrate cannot give himself jurisdiction by erroneously and capriciously deciding contrary to the truth upon the question upon which his jurisdiction depends.[3] In all cases in which Magistrates have to decide a collateral matter before they have jurisdiction, and they give themselves jurisdiction by finding facts which they are not warranted in finding, the superior Court will review their decision, and, if they have improperly given themselves jurisdiction, will set aside their proceedings; but where the question is a material element in the consideration of the matter they have to determine, and they, exercising their judgment as judges of the fact, have decided it on a conflict of evidence, it is contrary to principle and practice to interfere.[4]

1 All this is *per* Gibbs, C. J. in Burley *v.* Bethune, 5 Taunt. 583.

2 Pease *v.* Chaytor, 9 Jur. N. S. 664.

3 Reg. *v.* Nunneley, 27 L. J. 261 M. C., and E. B. and E. 852; and see the cases on this subject in Paley on Conv. 138—145.

4 *per* Cockburn, C. J. in *ex-parte*

61. Where a judicial officer is liable for a false imprisonment, he is liable for all the usual and ordinary injurious consequences thereof, such as hand-cuffing, cutting off the hair, payment of penalties, fees, and all such expenses as are reasonably necessary to enable the plaintiff to procure his liberty; but he is not liable for any unnecessary or excessive violence on the part of the officers executing the warrant.[1]

For what damages a judicial officer may be liable.

62. Another and very analogous invasion of the right of liberty, is a malicious arrest. The distinction in respect to this injury is that the intention or motive is, (as an exception to the general rule), an essential ingredient in the wrong.[2] It consists in an abuse of legal process, maliciously and without reasonable or probable cause, resulting in depriving another of his liberty. There must, therefore, be both the abuse, and the hurtful consequence. On the one hand, an act not amounting to a legal injury, does not become so by being done with a bad intent;[3] and on the other, a mere intention, or even the endeavour, will not supply the want of the act;[4] but where the direct and natural consequence—the arrest—has thus followed, it will be difficult to suggest, in any case, the absence of actual damage. A malicious arrest must be distinguished from a simply illegal arrest which constitutes a false imprisonment.

MALICIOUS ARREST.

63. Malice, in the legal acceptation of the word, is not confined to personal spite against individuals, but consists in a conscious violation

Malice in law and in fact.

Vaughan, L. R. 2 Q. B. 117; C. B. Australasia *v.* Willans, L. R. 5 P. C. 443.

1 Mason *v.* Barker, 1 C. and K. 100.

2 Broom's Com. 739.

3 Stevenson *v.* Newnham, 13 C. B. 285.

4 *per* Coleridge, J. in Lumley *v.* Gye, 2 E. and B. 247.

of the law to the prejudice of another.[1] Malice is of two kinds,—malice in law, and malice in fact. Malice *in law* is where a wrongful act is done intentionally, without just cause or excuse. Hence some acts are, in law, always malicious, without any proof being given of personal ill-will or ill-feeling.[2] Malice *in fact* may be personal against an individual, and be proved by expressions used, declarations made, or conduct generally evincing enmity towards a particular individual ; or it may be general, that is, not perhaps aimed at the individual sufferer, but an act proving a general disregard of the right consideration due to all mankind, and from which a malicious motive may be justly inferred.[3] It is then scarcely distinguishable from malice in law.[4]

Provisions of Code of Civil Procedure.

64. In connection with this subject, Sections 74 to 80 of the Code of Civil Procedure must be studied, and the optional remedy provided by Section 79 remembered. They resemble in many respects the provisions of an English statute.[5] The foundation of an action for malicious arrest is, that the party has obtained an order or authority from a Judge to make an arrest, by imposing some false statement upon the Judge, knowingly and designedly, and for the purpose of obtaining some undue advantage, or by stating certain facts as being true within his knowledge, when he knew nothing about them, or his belief in the truth of a particular statement, when he had no reasonable or probable cause for his belief.[6] If a person sets the process of

Foundation of the action.

1 *per* Lord Campbell, 9 Cl. and F. 321.

2 Bromage *v.* Prosser, 4 B. and C. 255.

3 *per* Pollock, C. B., 12 M. and W. 787.

4 Broom's Com. 738-9.

5 The 1 and 2 Vict. c. 110.

6 Gibbons *v.* Alison, 3 C. B. 185 ; Daniels *v.* Fielding, 16 M. & W. 206.

the Court in motion and a wrong person is arrested, he is only reponsible if he obtained such process fraudulently and improperly.[1] If a party truly states facts, and the Judge thereupon does an act which is erroneous, the party is not liable; for the damage then arises from the mistake of the Judge, and not the false statement of the party.[2] So, if a party, without fraud or falsehood, or without the want of reasonable and probable cause, fairly states facts, and succeeds in satisfying a Judge that the defendant is about to quit the country, and so obtains an order to arrest him, he is not liable to an action, though the defendant had no such intention. The subsequent discharge of the party, on showing that he had no such intention as imputed, affords no ground of action against the party procuring the arrest, if the original order for arrest was fairly obtained.[3]

Arrest, what is.

65. The fact of an arrest, consequent upon the order, must be shown, but the arrest is perfect where the party submits to the process, or to the commands of an officer intimating that he is in custody; and actual contact is not necessary.[4] In England the rule is that the determination of the first action in which the arrest was made must be shown;[5] but this seems a consequence of English procedure; and under the Indian Code it would seem that there might be a suit for a malicious arrest without showing that the first suit was determined.

66. Whoever makes use of the process of the Court for

1 Bheema Charlu *v.* Donti Murti, 8 Mad. H. C. 40.
2 Farley *v.* Danks, 4 E. and B. 499.
3 Daniels *v.* Fielding, 16 M. and W. 207.
4 Grainger *v.* Hill, 4 Bing. N. C. 212.
5 Selw. N. P. 1075; Rosc. Ev. N. P. 532.

Abuse of process for a foreign purpose.

some private purpose of his own, not warranted by the exigency of the writ, or the order of the Court, is liable to an action for damages for an abuse of the process of the Court. Thus, if an order to arrest is used for a purpose not warranted by it, viz., as a means of compelling the delivery of specific property, or of title deeds, the party so causing it to be used, will be liable in damages for the detention till the property was delivered, and for the loss from the retention of the property. When the complaint is, that the process of the law has been thus abused, and prostituted to an illegal purpose, it is perfectly immaterial whether or not it issued for a just cause of action, or whether the suit was legally terminated or not.[1]

Liability of a vakeel or agent.

67. If a vakeel or agent, maliciously, and without reasonable or probable cause, knowing that his client has no just claim against the party, assists in putting the law in motion, and effects an unlawful and malicious arrest, he, as well as his client who has authorized the proceeding, will be responsible in damages.[2]

Liability by using name of a third party.

68. So, it seems that, if A, maliciously and without reasonable or probable cause, uses the name of B, or induces B to bring an action against C, and thereby C suffers damage, A may become liable to C; as where B has been non-suited with costs, but was a pauper or insolvent, when the action was brought, and A knew it; but not if B was solvent, for then C may get the costs from B, and he suffers no damage.[3] The case put is

1 Grainger *v.* Hill, 4 Bing. N. C. 212.

2 Stockley *v.* Hornidge, 8 C. & P. 16; Green *v.* Elgie, 5 Q. B. 99.

3 Cotterell *v.* Jones, 11 C. B. 713; Collins *v.* Cave, 28 L. J. 204 Exch.

an instance of an injury resulting in damage to personal property, that is, in a pecuniary loss; but one result of such an action might be an injury to the person, as an arrest.

Abuse of final process.

69. So also there may be a malicious abuse of final process, and consequent liability; as, where on process of execution on a judgment, the debtor has been arrested and kept in custody for a greater amount than remains due on the judgment, and he can prove that, by reason of the arrest and detention for the larger sum, his imprisonment was prolonged, or the expense of his discharge increased. Then his remedy, where the thing has been done inadvertently without malice, is to apply to the Court that he may be discharged, and that satisfaction may be entered up on payment of the balance justly due. But where the creditor knew the sum for which execution was sued out, to be excessive, and his motive was to oppress or injure his debtor, it would be discreditable to the law if discharge was the only redress, although, by the excess, the debtor may have suffered a long imprisonment, and have been utterly ruined in his circumstances.[1] But as long as there is a judgment against the plaintiff, though erroneously entered for a larger amount than due, the plaintiff is estopped thereby.[2]

Damages in such action.

70. By way of damages it may be shown that the plaintiff, by reason of the arrest, was prevented from attending to his business, was injured in his credit, and was put to and incurred divers costs and

1 All this is *per* Lord Campbell, C. J. in Churchill *v.* Siggers, 3 E. and B. 937.

2 Huffer *v.* Allen, L. R. 2 Exch. 14.

expenses for his maintenance during the detention, and in obtaining his discharge.[1]

71. A malicious prosecution, or to put the criminal law in force maliciously and without reasonable and probable cause, is wrongful.[2] The injury may be viewed as one causing, either (1) damage to a man's reputation, as where the matter whereof he is accused is scandalous; or (2) damage to his person, as where he is arrested in consequence, or put in danger to lose his life, limb, or liberty; or (3) damage to his property, where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused.[3] In some one or other of these respects, there must be proof of actual damage.[4]

MALICIOUS PROSECUTION.

72. The injury exists only where malice is combined with want of probable cause. Malice alone is not sufficient, because a person actuated by the plainest malice may, nevertheless, have a justifiable reason for the prosecution.[5] From the most express malice, the want of probable cause cannot be implied; whatever the feelings of malice, still if there was reasonable and probable cause for the prosecution, the accuser is not liable.[6] But from the want of probable cause, malice may sometimes be inferred, though it is only presumptive evidence of malice.[7]

Nature of the injury.

1 Jenings *v.* Florence, 26 L. J. 277 C. P.; Churchill *v.* Siggers, 3 E. and B. 929.

2 Churchill *v.* Siggers, 3 E. and B. 937.

3 *per* Lord Holt, C. J. in Savile *v.* Roberts, 1 Ld. Raym. 364.

4 Byne *v.* Moore, 5 Taunt. 187; 2 Selw. N. P. 1073.

5 Willans *v.* Taylor, 6 Bing. 186.

6 Turner *v.* Ambler, 11 Q. B. 257; Moonee Ummah *v.* M. Com. Madr., 8 Mad. H. C. 151.

7 Johnstone *v.* Sutton, 1 T. R. 544; Mitchell *v.* Jenkins, 5 B. and Ad. 594.

73. Each case will depend much upon its particular circumstances, but, generally, the facts ought to satisfy any reasonable mind that the accuser had no ground for proceeding but his desire to injure the accused.[1] Proof of an acquittal for want of prosecution is not even *primâ facie* evidence of malice; various reasons may have necessitated the abandonment.[2] Proof of the absence of belief in the truth of the charge by the party making it, is almost always involved in the proof of malice.[3] Any statements or declarations made by the accuser, tending to show that he was actuated by spite and ill-will in instituting the prosecution, are, of course, evidence of malice.[4] If his conduct shows that the accuser believed that the party proceeded against as a thief, took the goods under the erroneous notion that he had a lien upon them, or had a right to take and detain them, there is then evidence of malice and of want of probable cause.[5] So also, if the accuser's object was to enforce payment of a debt, or restitution of goods unlawfully detained, without having any reasonable ground for preferring a criminal charge.[6]

Evidence of the injury.

74. It is no answer that the accuser was bound over, by recognizance, to prosecute and give evidence, if that was merely the result of the prior malicious proceedings originated by him.[7] And where A gives false evidence in a Court, and the Judge, believing B's contrary evidence to be false, commits B for perjury, and binds A over to prosecute, then A, it has been held, will be

Accuser bound over to prosecute.

1 Willans *v.* Taylor, 6 Bing. 186.
2 Ibid; Purcell *v.* Macnamara, 9 East, 361.
3 Addison, 523.
4 Mitchell *v.* Williams, 11 M. and W. 217.
5 Huntley *v.* Simson, 27 L. J. 134 Exch.
6 Brooks *v.* Warwick, 2 Stark. 393.
7 Dubois *v.* Keats, 11 Ad. & E. 332.

liable, as he may be said to have caused the prosecution, since he ought not to have gone on with a charge known to him to be false, nor have supported it by his own evidence.[1]

Charge on knowledge or on suspicion.

75. A man may prefer a charge either on the foundation of what he knows, or of what he suspects. In the latter case, it is enough if there were circumstances sufficient to induce suspicion on the mind of a cautious person.[2] But if the charge was wilfully false, or his statements untrue to his knowledge at the time he made them, or of such a nature that, having the means of inquiry he ought not to have founded the charge on them without inquiry, he will be liable; and it will not be for him to object that, on the facts stated, the Magistrate ought not to have granted the warrant.[3] The neglect to use a ready and obvious mode of enquiry is an element in determining the question of reasonable and probable cause; thus acting on hearsay evidence when the original source of information was easily accessible, may be but is not necessarily such.[4]

Liability from error of Magistrate.

76. But if a man fairly states the facts of his case to a Magistrate, and the Magistrate conceives that to be an offence which is not an offence but only matter for a civil action, he is not responsible for the erroneous judgment of the Magistrate, and the acts consequent upon it.[5] It is otherwise if with-

1 Fitzjohn *v.* Mackinder, 7 Jur. N. S. 1283.
2 Davis *v.* Noake, 6 M. & S. 32.
3 Cohen *v.* Morgan, 6 D. and R. 8; Elsee *v.* Smith, 1 D. and R. 105.
4 Perryman *v.* Lister, L. R. 4 H. L. 521.
5 Leigh *v.* Webb, 3 Esp. 165; Johnson *v.* Emerson, L. R. 6 Exch. 344, 373, 380; an action for procuring an adjudication in bankruptcy in which the Court was divided.

out probable cause, he made a charge of an offence, though acting under the advice of the Magistrate.[1]

77. Where A has taken B's property, but it is obvious that he did so under a notion of right, there is no reasonable or probable cause to charge A criminally. B may not say that he was justified because A had no right to do it, no matter how honest his intention. If that is his opinion, it is a blunder on his part, and one of those blunders for which a man who commits it, should be punished, as it is very likely that the person charged with felony through the blunder, will, as long as he lives, be sometimes asked whether he had not been had up before the Magistrate for felony.[2]

Liability from error of opinion as to nature of act.

78. The reasonableness and probability of the ground for prosecution may depend upon the inquiry, whether other facts which furnished an answer to the prosecution were known to the accuser at the time it was instituted.[3] So, the reasonable cause must be existing in the mind of the accuser at the time of the prosecution, and not have come to his knowledge afterwards.[4] A full knowledge of the facts, but a long delay to act upon them, may throw doubt upon the *bonâ fide* belief of the accuser in the truth of the charge. Though he must always have had such *bonâ fide* belief, that alone will not excuse him, for if he formed his conclusion rashly and inconsiderately, he is not warranted in acting on it.[5] It is the rule that evidence of the

On what the probable cause may depend.

1 Addison, 528.

2 *per* Bramwell, B. in Huntley *v.* Simson, 27 L. J. 137 Exch.

3 Turner *v.* Ambler, 10 Q. B. 252; Panton *v.* Williams, 2 Q. B. 194.

4 Delegal *v.* Highley, 3 Bing. N. C. 950; 1 Hilliard, 495.

5 1 Hilliard, 496.

general bad character of the plaintiff is not admissible in defence to show probable cause; but evidence of his previous conviction for a like offence is.[1] But if the plaintiff was a notorious associate of thieves, proof of that ought to be some justification of prosecution for theft, though evidence as to general bad character otherwise would be irrelevant.[2]

Probable cause a question of fact and law.

79. The question of reasonable and probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to show it reasonable and probable, or not, are true and existed, is a matter of fact; but whether, supposing them to be true, they amount to a reasonable and probable cause, is a question of law.[3]

Liability when acting through a third person.

80. It is immaterial whether the party alone makes the charge, or whether he stirs up and procures another to make it. In either case he is liable in damages.[4] The procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property or to personal security; he who procures the wrong is a joint wrongdoer, and may be sued either alone or jointly with the agent.[5] When proceedings have been commenced by an agent, without the knowledge of the principal, the responsibility of the lattler begins at the point at which he became aware of the proceedings; but the question as to him is, not whether the proceedings were

1 Addison, 544; 1 Hilliard, 532.

2 Mayne on Damages, 262.

3 Sutton *v.* Johnstone, 1 T. R. 545; Lister *v.* Perryman, L. R. 4 H. S. 521, where this rule is regretted.

4 Savile *v.* Roberts, 1 Ld. Raym. 377.

5 *per* Erle, J. in Lumley *v.* Gye, 2 E. and B. 232.

instituted maliciously and without reasonable and probable cause, but whether in continuing them he so acted.[1]

What the plaintiff in an action must show.

81. It is not necessary where the action is for a malicious complaint to a Magistrate, to show that the charge was taken down in writing, and acted upon by the Magistrate; it is enough that it was made to the Magistrate with the view of inducing him to entertain it as a charge of felony.[2] It is sufficient to maintain an action for a malicious prosecution, if some only of the charges in the indictment, were malicious and without probable cause.[3] But it must appear that the prosecution is determined, for otherwise it does not follow that the plaintiff in the action may not be convicted, and the prosecution thereby shown to be just;[4] but the plaintiff need not prove an acquittal, for a prosecution may be determined in various ways.[5] The nature and extent of the damage resulting to the plaintiff from the proceedings of the defendant must also be shown. A conviction of the plaintiff by a Magistrate, so long as it has not been quashed on appeal, affords a conclusive answer to the action;[6] and it is the same though the conviction was under a Statute which allowed of no appeal.[7] It is not to be presumed that any one has acted illegally; there must, therefore, be some evidence of want of probable cause, before the defendant in the action can be called upon to justify his conduct.[8] But want of probable cause is, in effect, a negative, and very

1 Western *v.* Beeman, 27 L. J. 57 Exch.
2 Clarke *v.* Postan, 6 C. & P. 423.
3 Reed *v.* Taylor, 4 Taunt. 616.
4 Fisher *v.* Bristowe, 1 Doug. 215; Rosc. Ev. N. P. 547.
5 2 Selw. N. P. 1072.
6 Mellor *v.* Baddeley, 2 Cr. and M. 678.
7 Basebe *v.* Matthews, L. R. 2 C. P. 684.
8 Willans *v.* Taylor, 6 Bing. 187.

slight evidence of a negative is sufficient to call upon the other party to prove the affirmative.[1]

82. Similarly and subject to the same rules, if a person, maliciously and without probable cause, knowingly or recklessly, and without due inquiry, swears to what is false, and so causes a search warrant to issue, he is liable to an action for damages at the suit of the party who has been damnified by the execution of the warrant.[2] There may, in such a case, be no invasion of the rights of the person, but the damages are given for the trespass under the malicious abuse of process. So a constable having a search warrant may be liable for staying in the house an unreasonable time, or using needless violence, or taking articles not specified, or not connected in any way with the stolen property.[3]

Maliciously causing a search.

83. There is a great difference between, maliciously and without probable cause, bringing a civil action, and the similarly putting the criminal law in motion to the damage of another. From the former the only liability is what arises from being charged with costs, or from any special provisions regarding vexatious suits. The one is the exercise of the private right of action; the other is an abuse, by a private person, of the public criminal law. This action also differs from one for false imprisonment, where what was done by the defendant is, upon the stating of it, manifestly illegal; but the prosecution is, upon the stating of it, manifestly legal, and the wrong consists in the abuse.[4] No action lies against a commanding officer for maliciously and without

Malicious suit and prosecution distinguished.

1 Cotton *v.* James, 1 B. & Ad. 133.
2 Cooper *v.* Booth, 3 Esp. 144.
3 Crozier *v.* Cundey, 2 B. & C. 232.
4 Johnstone *v.* Sutton, 1 T. R. 544.

reasonable and probable cause bringing a subordinate to a court martial, that being an act of discipline, and within the powers incident to his situation.[1] But he may be liable for false imprisonment when he exceeds his authority in imprisoning a subordinate.[2]

84. A libel consists in the malicious publication of a false and defamatory statement, expressed in printing or writing, or by signs, pictures, &c., tending to injure the reputation of another, and thereby exposing such person to public hatred, contempt, or ridicule.[3] Where the statement is expressed in words only, it is oral slander, but may not always be actionable. For libel a person may also be liable criminally, but the civil and criminal liability do not always coincide. The only civil remedy is a suit for damages; there is no jurisdiction to restrain by an injunction the publication of a libel.[4] By the Penal Code, a person may also be liable criminally for oral slander. Chapter 21 of the Penal Code on defamation should be consulted.

LIBEL and SLANDER defined.

85. There must be a publication, and it must be malicious and not privileged, and the matter must be both false and defamatory. With the exception of some kinds of oral slander, as soon as the injury is complete damage is implied, and actual damage need not be shown. One may be liable criminally, but not it seems, civilly, for libelling a dead person; but actual damage

Essentials.

1 Sutton *v.* Johnstone, 1 Bro. P. C. 76.

2 Swinton *v.* Molloy, cited 1 Taunt. 537; see *Ex. p.* Mansergh, 7 Jur. N. S. 825.

3 2 Selw. N. P. 1049; 1 Hilliard, 267; Parmiter *v.* Coupland, 6 M. & W. 105.

4 Prudential A. Co. *v.* Knott, L. R. 10 Ch. 142.

to the surviving relatives from the libel would be a ground for civil liability.[1]

86. If a man writes a libel and puts it into his desk, this is no publication of it. But the moment he delivers a libel from his hands, and ceases to have control over it, the uttering or publishing of the libel is complete. There need not be an actual manifestation of its contents, but a delivery is sufficient.[2] But if the libellous matter is contained in a private letter to the plaintiff, and delivered to him only, it is no publication, though the writer may be liable criminally;[3] but it is otherwise, if defendant knew that it was the habit of plaintiff's clerk to open his letters in his absence, and in point of fact the clerk does open the letter.[4] To send such a letter to a man's wife is a publication;[5] so to send it by post or otherwise to a third party;[6] or by telegram to the person himself;[7] so if a copy of the libel is delivered to the agent of the plaintiff sent to buy it.[8] The sale of each copy of a printed libel is a separate publication.[9] Unless there are circumstances to rebut the presumption, it seems that proof that the libel produced is in the defendant's hand-writing, will be presumptive evidence of publication.[10] So, the publication may be the act of the defendant's agent, and render him liable if within the scope of the agent's authority, as where a shopman sells in the shop a book published by his master

Publication.

1 Rex. *v.* Topham, 4 T. R. 127; Penal Code, s. 499, Expl. 1.
2 Rex. *v.* Burdett, 4 B. and Ald. 126, 143, 160.
3 Wenman *v.* Ash, 13 C. B. 836; Phillips *v.* Janson, 2 Esp. 624.
4 Delacroix *v.* Thevenot, 2 Stark. 63.
5 Wenman *v.* Ash, 13 C. B. 836.
6 Warren *v.* Warren, 1 C. M. and R. 250.
7 Williamson *v.* Freer, L. R. 9 C. P. 393.
8 Brunswick *v.* Harmer, 1 Q. B. 189.
9 Rex. *v.* Watson, 2 Stark. 130; Rex. *v.* Carlisle, 1 Chitty R. 451.
10 Rex. *v.* Beare, 1 Ld. Raym. 417.

a bookseller.[1] A general request to write a libel renders a man liable, and he must take his chance of what appears.[2] So a request to another (not being the mere expression of a wish) to publish defamatory matter, followed by a publication of the substance of the matter communicated for the purpose, will induce liability.[3]

Malice.

87. Further, the publication must be malicious and not privileged. Generally malice in law will be sufficient, but sometimes malice in fact, or express malice, must be shown.[4] If the matter is false and defamatory, the law infers malice, unless the circumstances attending the publication rebut that inference; then the occasion is said to repel the presumption, and the statement to be privileged; but this qualified defence may be rebutted in turn, by proof of malice in fact, or express malice.[5] Otherwise, a malicious intention is not essential to a libel, for malice in law means a wrongful act done intentionally without just cause or excuse. If one slanders a man, though he does not know him, nor intend to injure him, the injury is none the less, and there is no legal excuse for the slander.[6] Evidence of other libels, showing a practice of libelling the plaintiff, is admissible to prove actual malice.[7] So needlessly sending by telegram what might have been privileged if sent by letter, may be evidence of malice.[8] But, in the

1 Rex. *v.* Almon, 5 Bur. 2686.
2 Reg. *v.* Cooper, 8 Q. B. 536.
3 Parkes *v.* Prescott, L. R. 4 Exch. 169.
4 Coxhead *v.* Richards, 2 C. B. 605; see ante § 63 for a definition of malice.
5 Cooke *v.* Wilde, 5 E. and B. 335; 2 Selw. N. P. 1054.
6 Broomage *v.* Prosser, 4 B. and C. 255; Wenman *v.* Ash, 13 C. B. 836.
7 2 Selw. N. P. 1063; Barret *v.* Long, 3 H. L. C. 414.
8 Williamson *v.* Freer, L. R. 9 C. P. 393.

When a communication is privileged.

absence of actual malice, if a man, in good faith, and believing the matter to be true, makes a communication in the discharge of some public or private duty, whether legal, moral or social, or in the conduct of his own affairs, and with a fair and reasonable hope of protecting his own interest in a matter where it is concerned, such communication, if made to a person having a corresponding duty or interest, is privileged, though it contains criminatory matter which, otherwise, would be slanderous and actionable.[1] If the occasion is such as repels, the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of malice in fact;[2] but the libel itself may be looked at for this purpose.[3] A plea of privileged communication must allege that the defendant made the communication on a lawful occasion, believing it to be true, and without malice, or at least *boná fide*.[4] Where a communication relates to two persons, and is made as to one under circumstances such as to make it privileged as to him, it is privileged also as to the other.[5] The question of *bona fides* is one of fact; that as to the lawfulness of the occasion one of law.[6]

Statements made in evidence.

88. There are various occasions on which such privilege exists; and in some of the following instances it will be seen that the defence of privilege prevails even though there be actual malice, the occasion of the statement being allowed on grounds of public policy to operate as an absolute bar to

1 Harrison *v.* Bush, 5 E. and B. 348; Whitely *v.* Adams, 10 Jur. N. S. 470; Laughton *v.* Bishop, S. and M. L. R. 4 P. C. 495.

2 Taylor *v.* Hawkins, 16 Q.B. 321.

3 2 Selw. N. P. 1054.

4 Smith *v.* Thomas, 2 Bing. N. C. 372.

5 Davies *v.* Snead, L. R. 5 Q. B. 608.

6 Coxhead *v.* Richards, 2 C. B. 584.

a suit.[1] Thus, what is sworn to by a witness or party, in the course of a judicial proceeding before a Court of competent jurisdiction, is not actionable, though it is false, scandalous, and malicious, provided it is not wholly irrelevant. The pertinence of the matter is a protection, and the proper remedy is a prosecution for perjury.[2] Statements made to or received by a military Court of inquiry are similarly privileged, when referring to the subject of inquiry.[3] But if the Court has no jurisdiction in the matter, and no right to entertain the proceeding, and the charge is recklessly and maliciously made, it is not privileged.[4] So, where comments are made orally in the conduct of a cause, as by a counsel, or a party conducting his own case, they are privileged; considerable latitude is necessarily allowed, and it is pertinent to the cause for counsel to comment freely, and indulge even in any calumnious imputations which the facts before the Court, whether true or false, may appear to warrant. The mere strength of the expressions is not to be too nicely objected to, though counsel ought not to avail themselves of their situation maliciously to utter words unjustifiable and irrelevant.[5] So, judicial officers are not responsible for slanderous words, though false and malicious, if at least they are material, and relevant to a cause or matter in issue before them, and within their jurisdiction;[6] and it has been held that no action will lie against a County Court Judge, for words spoken whilst

Comments of counsel, &c.

1 See Starkie on Libel (3rd ed.) 53, *et seq.*

2 Henderson *v.* Broomhead, 4 H. and N. 579; 28 L. J. 360 Exch.; Revis *v.* Smith, 18 C. B. 126; Seaman *v.* Netherclift, 1 C. P. D. 540; and see 1 Hilliard, 364.

3 Dawkins *v.* Rokeby, L. R. 8 Q. B. 255, and 7 H. L. 744.

4 Lewis *v.* Levy, 27 L. J. 282 Q. B.

5 Hodgson *v.* Scarlett, 1 B. and Ald. 240; see 1 Hilliard, 283.

6 Lewis *v.* Levy supra; Thomas *v.* Churton, 8 Jur. N. S. 795.

sitting as a Judge though it is alleged that the words were irrelevant and spoken falsely and maliciously and without justifiable cause.[1] It seems that the communications of Military and Naval Officers are also absolutely privileged, so that no action will lie by a subordinate against his superior officer.[2]

Petitions, &c. to official authorities.

89. So, petitions and memorials prepared *bonâ fide*, and forwarded to the proper authorities, complaining of the conduct of public officers, and containing statements and allegations honestly believed to be true, are privileged, if not made on frivolous grounds, or recklessly without regard to the truth.[3] So, if a person, in good faith, for the purpose of obtaining redress, addresses himself to a public officer, whom he reasonably conceives to have power to assist him, he is protected, though he was mistaken as to the extent of the jurisdiction of the officer; but not if the officer was obviously incompetent to notice such a matter.[4] It would seem that defamatory statements made in good faith before a caste meeting at an inquiry into a caste matter, would be privileged.[5]

Reports between public officers.

90. So, one public officer may address to another a statement of facts pertinent to a matter which it is his duty to investigate, and which he believes to be true. But if he introduces irrelevant calumny, and strictures upon the motives and conduct of others which the facts stated do not warrant, he

1 Scott *v.* Shepherd, L. R. 3 Exch. 220.
2 Dawkins *v.* Paulet, L. R. 5 Q. B. 94; but qy. Cockburn, C. J. *diss.*
3 Harrison *v.* Bush, 5 E. and B. 344.
4 *Ibid.* Wenman *v.* Ash, 13 C. B. 845.
5 Rex. *v.* Hart, 1 W. Bl. 386; and see several American cases to this effect in 1 Hilliard, 374—6.

will exceed his privilege.[1] Statements made by one official regarding the conduct of another official to the superior authority are privileged, if made honestly in belief of their truth, and it is for the plaintiff to prove that they were not so made.[2]

Privilege by reason of relationship

91. So, near relationship will justify a confidential communication, provided the party really believed in the truth of the statements which he made, though such statements were, in fact, erroneous. A similar communication honestly made between friends, purely to prevent an injury, and not for the purpose of slandering, is privileged. But this will not justify the writing of mere idle gossip, carelessly and without inquiry; the private duty to disclose the truth, and so protect a friend, is counterbalanced by the moral duty not recklessly to take away another's character. There should be some duty, social, moral or legal, inducing to the communication.[3]

—or friendship.

Privilege by reason of interest.

92. So, if a person has a pecuniary interest in the subject-matter to which his communication relates, and makes it to protect his own interest, in the full belief that it is true, and without any malicious motive, it is privileged.[4] But here also the belief is not an honest belief, if it is formed in a reckless and inconsiderate manner; as where the means of inquiry are available, but are neglected. There is a wide distinction between a reckless assertion of assumed facts, and honest communications made, with a view to inquiry and information, by a party

1 Cooke v. Wilde, 5 E. and B. 328.
2 Hart v. Gumpach, L. R. 4 P. C. 458.
3 Huntley v. Ward, 6 Jur. N. S. 18; Harrison v. Bush, 5 E. and B. 344; Whiteley v. Adams, 10 Jur. N. S. 470; Dickeson v. Hilliard, L. R. 9 Exch. 79.
4 M'Dougall v. Claridge, 1 Camp. 266.

interested in knowing the truth.[1] Thus the Directors of a Company are privileged in communicating to the shareholders remarks made by auditors on the manager, and express malice must be shown.[2]

Characters of servants when privileged.

93. Any thing written or said by a master when he gives the character of a servant, is privileged, if given with honesty of purpose in answer to enquiries by a party interested; and this, though the statement may be made in the presence of a stranger, and may be untrue in fact.[3] So, when he thinks another is going to engage his servant whom he believes to be an improper person, he may take steps to communicate the facts. But where he thus volunteers to give the character, stronger evidence of good faith and absence of malice will be required than where he gave it upon inquiry.[4] So, a master should honestly communicate any credible facts as to misconduct of a servant after he left his situation, or where he has afterwards discovered that the good character he before gave was undeserved.[5] The terms, language, and occasion of the communication, must be looked to in order to determine whether, though it was untrue, the master acted honestly and without malice; and the burden of proof is not upon the master to prove the truth of the aspersions, but upon the servant to show them false and malicious.[6] A servant cannot bring an action against his master for not giving him a character.[7]

1 Spill *v.* Maule, L. R. 4 Exch. 237.

2 Lawless *v.* Anglo-Egyptian, &c. Co., L. R. 4 Q. B. 262.

3 Toogood *v.* Spyring, 1 C. M. and R. 193.

4 Pattison *v.* Jones, 8 B. and C. 578.

5 Child *v.* Affleck, 9 B. and C. 403; Garner *v.* Slade, 13 Q. B. 801.

6 Rogers *v.* Clifton, 3 B. and P. 594.

7 Carrol *v.* Bird, 3 Esp. 201; 2 Selw. N. P. 1267.

Facts or advice given in good faith.

94. So, where a third person has good reason to believe that a servant has been guilty of misconduct, he may be justified in communicating this to his master.[1] And, generally, any thing written or spoken in good faith by way of moral advice is privileged; as, if a man writes to a father, advising him to have better regard to his children, and using scandalous words, it is only reformatory, and shall not be intended to be a libel.[2] But it would be if published in a newspaper, for there is no pretence or occasion for such a mode of communication.[3] For a like reason it has been decided, that to tell, in a newspaper, a story of an individual calculated to render him ludicrous is libellous though he may have told the story of himself before its publication in print.[4]

Comments in excess of privilege.

95. In all the preceding cases a person may be liable for comments in excess of his privilege; as, where the terms used were virulent and abusive, or stronger than the occasion justified.[5] To protect his own interest, a man may use language that is relevant though painful to another, but he must not indulge in needless comments about motives.[6] If A differs from B on a business matter, A is not justified in writing to B's clerk that B is making mean and dishonest attempts to defraud him.[7]

Reports of judicial proceedings.

96. A substantial, fair, and correct report of the proceedings in any Court of Justice is privileged,[8] except where the matters given in

1 Amann *v.* Damm, 7 Jur. N. S. 47.

2 Peacock *v.* Raynell, 2 Brownl. 151.

3 Bac. Ab. Libel. A. 2.

4 Cook *v.* Ward, 6 Bing. 409.

5 Fryer *v.* Kinnersley, 10 Jur N. S. 441.

6 Cooke *v.* Wide, 5 E. and B. 328.

7 Tuson *v.* Evans, 12 Ad. and E. 733.

8 Hoare *v.* Silverlock, 9 C. B. 20; Ryales *v.* Leader, L. R. 1 Exch. 296.

evidence are of a grossly scandalous, blasphemous, or immoral tendency; for it is no advantage to the public, or public justice, that such matter should be detailed.[1] An incorrect report of proceedings in Court, if attended with special damage, will be actionable.[2] Further, the report must not be one-sided, or false, or highly coloured; and if defamatory comments, allegations, and opinions of the reporter are mixed up with it, the privilege is lost.[3] In theory at least, by the English law, a report of preliminary inquiries, as before Magistrates, is not privileged when the accused is committed or held to bail, and certainly not when such preliminary inquiry is carried on in private, as a Magistrate may lawfully do;[4] but only when he is discharged.[5] The Penal Code does, though, include such inquiries when in public, as privileged, and, in practice, it is the same in England.[6] But a report of a slanderous complaint publicly heard by a Magistrate without jurisdiction in the matter, or of an application made to him extra-judicially, as for advice, is not privileged.[7]

Reports of public meetings.

97. This privilege is not extended to the reports of proceedings of public meetings or of others than judicial officers. At such meetings things may be said very relevant to the subject in hand, but very calumnious; it would be hard that the calumny should be published, and the party be unable to put the publisher to the proof of it.[8] It will be a libel to publish a paper read

1 Rex. *v.* Carlisle, 3 B. and Ald. 169; Steele *v.* Brannan, L. R. 7 C. P. 261.

2 Malachy *v.* Sloper, 3 Bing. N. C. 371.

3 Stiles *v.* Nokes, 7 East, 492; Lewis *v.* Clement, 3 B. and Ald. 710.

4 Cr. Pro. C., s. 279.

5 Duncan *v.* Thwaites, 3 B. and C. 583; Lewis *v.* Levy, E. Bl. and E. 557.

6 Penal Code, s. 499, fourth exc. expl.

7 Lewis *v.* Levy supra; McGregor *v.* Thwaites, 3 B. & C. 24.

8 Davison *v.* Duncan, 7 E. and B. 231.

at such a meeting, which it would be no libel to publish if it had been read in a Court of Justice.[1] So, papers printed for the use of members of Parliament, or of one of our Indian Councils, would be privileged; but must not be circulated among others not members. So, what such a member says in his place in council is privileged, but he must not print and publish his speech if libellous.[2] This is probably still the law as to a single speech, for, apart from express law, the absolute exemption which is allowed to the statements made in judicial proceedings even when wilfully false and malicious, is not extended to the publication of statements made on these occasions. But it is the privilege of every subject of the realm to discuss matters of public interest honestly and without actual malice; and a faithful and full report of a debate in Parliament may to this extent be privileged, as also a fair and reasonable comment on the facts disclosed;[3] and so also a fair criticism on a matter of public and national importance; and it is for the Court, as a matter of law, to decide whether the occasion is such as to carry the privilege in the absence of evidence of actual malice.[4]

98. A fair criticism of a book, a work of art, or public performance, is privileged. Authors are liable to criticism, to exposure, and even to ridicule, when they lay themselves open to it; but no one has a right to follow the author into domestic life for the

Critiques when privileged.

1 Popham *v.* Pickburn, 8 Jur. N. S. 179.

2 Stockdale *v.* Hansard, 9 Ad. and E. 1; Rex. *v.* Creevy, 1 M. and S. 280; but see 3 and 4 Vict. c. 9 papers published by authority of Parliament are now privileged.

3 Wason *v.* Walters, L. R. 4 Q. B. 73.

4 Henwood *v.* Harrison, L. R. 7 C. P. 625.

purpose of slander.[1] It should be remembered in India, that the editor of a newspaper is, in like manner, protected; one journalist or public writer may criticise another, and ridicule his sentiments and opinions, but he is not justified in attacking his private character, or imputing to him dishonorable conduct.[2] A journalist has no greater privilege than an ordinary person, and in criticising a scheme submitted to the public, may not impute base and sordid motives to the author of it.[3] So, a person has the right to comment upon the public acts of a minister, upon the public acts of a general, upon the public judgments of a judge, upon the conduct of persons at a public election meeting,[4] upon the sermons (it seems) of a clergyman, or upon his conduct in respect to his church, or conduct of public worship,[5] or upon the public skill of an actor, but he has no right to impute to them such conduct as disgraces, and dishonors them in private life.[6] If one trader publish a disparaging notice of the goods of another, not being a mere puff of his own in comparison, it will be actionable, if false to the knowledge of the party, and attended by special damage.[7]

Slander how it sometimes differs from libel.

99. The difference between oral slander and libel is, that some words which, if written, would be actionable, are not so when spoken under the same circumstances, unless followed by special damage. The reason may be that writing, as an act of deliberation, proves a more malicious mind, and its form

1 Carr v. Hood, 1 Camp. 355 (n.)
2 Stuart v. Lovell, 2 Stark. 97.
3 Campbell v. Spottiswoode, 9 Jur. N. S. 1069.
4 Davis v. Duncan, L. R. 9 C. P. 396.
5 Kelly v. Tinling, L. R. 1 Q. B. 699.
6 Parmiter v. Coupland, 6 M. and W. 108; Gathercole v. Miall, 15 M. and W. 319; qy. if the sermon is only delivered, but not printed; but see 15 Law Mag. 238.
7 Young v. Macrae, 9 Jur. N. S. 539; 1 Hilliard, 389; Evans v. Harlow, 5 Q. B. 633; Jenner v. A'Beckett, L. R. 7 Q. B. 11.

tends to perpetuate and spread the damage. Words spoken may be said hastily in anger, and if the charge is not very gross, it often does not go beyond those who first heard it, and who perhaps know both parties, and the real truth.[1]

What slander is always actionable.

100. Still some words are actionable without proof of damage, if maliciously spoken, and false, and defamatory. Thus, falsely to impute to any person that he has been guilty of any criminal or indictable offence;[2] or that he is (but not that he once was) afflicted with any loathsome or contagious disease, as leprosy, &c., which would cause him to be shunned;[3] or to speak falsely of a tradesman in the way of his trade, as that he uses false weights,[4] or to make any other imputation the natural consequence of which is to prevent people resorting to his shop;[5] or to impute misconduct, or gross ignorance, or incapacity to professional men in the discharge of their professional duty; as, to say of a medical man that he has misconducted himself with his female patients, or that he is a quack or not legally qualified;[6] or to say of a barrister or vakeel that he has cheated or deceived his clients;[7] or of a clergyman that he leads an immoral life;[8] or of a public officer that he is habitually negligent or corrupt, but not merely that he wants capacity unless special damage follows.[9] Such imputations, if the party is still in the exercise and practice of his trade, profession, or office

1 DeCrespigny *v.* Wellesley, 5 Bing. 403.

2 Addison, 701; 1 Hilliard, 280, 295.

3 Bloodworth *v.* Gray, 7 M. and Gr. 334; Carslake *v.* Mapledoram, 2 T. R. 475.

4 Griffiths *v.* Lewis, 7 Q. B. 65; Foulger *v.* Newcomb, L. R. 2 Exch. 327.

5 Riding *v.* Smith, 1 Exch. D. 93.

6 Ayer *v.* Craven, 2 Ad. and E. 2; 1 Hilliard, 328.

7 King *v.* Lake, 2 Ventr. 28.

8 Dodd *v.* Robinson, Aleyn. 63.

9 Heywood *v.* Thorn, 8 C. B. 313.

at the time, are actionable without proof of damage.[1] If the words are actionable, the existence of a rumour does not justify the repetition of the slander contained in it without showing that the defendant believed it to be true and that he spoke the words on a justifiable occasion.[2]

What words not actionable without damage.

101. By the English law, all other slander, unless followed by actual damage, the legal and natural consequence of it, is not actionable. Thus, it is not so, if a man says of another that he is a swindler,[3] or of a woman that she is a whore, or even that he has himself committed adultery with her, unless there ensue some damage, as loss of a situation, loss of a marriage, &c.[4] The loss of the hospitality of divers friends (though not the loss of her husband's companionship), or, where the wife assisted in the shop, a general loss of custom, has been held a sufficient special damage when consequent upon the imputation.[5] But this rule that an imputation by words, however gross, on an occasion however public, upon the chastity of a modest matron or pure virgin, is not actionable without proof of actual pecuniary damage, has been justly denounced by high authority, as barbarous.[6] The Courts in India should adopt a more reasonable rule. In America, it seems, the prevailing doctrine now is that words imputing to a female want of chastity are actionable without proof of special damage.[7] The loss must be the imme-

1 Ballamy *v.* Burch, 16 M. and W. 590.

2 Watkins *v.* Hall, L. R. 3 Q. B. 396.

3 Savile *v.* Jardine, 2 H. Bl. 531. To call a man "a thief" as a mere term of general abuse is not actionable, 2 Selw. N. P. 1265.

4 Wilby *v.* Elston, 8 C. B. 142; Roberts *v.* Roberts, 10 Jur. N. S. 1027.

5 Davies *v.* Solomon, L. R. 7 Q. B. 112; Riding *v.* Smith, 1 Exch. D. 91.

6 *per* Lords Brougham and Campbell in Lynch *v.* Knight, 8 Jur. N. S. 724.

7 1 Hilliard, 299—302.

diate consequence of the slander; thus, he who repeats a slander, though he names the original utterer, is alone liable, unless he repeated it in a particular quarter by desire of the utterer, or it was his known duty so to repeat it.[1] So, if the loss of a situation is a mere wrongful act of the master, the slanderer is not liable any more than if A slanders B, and C believing the slander, beats B.[2] To make words actionable by reason of special damage, the consequence must be such as, taking human nature as it is, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated to follow from the speaking of the words, and it need not be such as would reasonably follow.[3]

Rule of the Penal Code.

102. By the Penal Code a man is criminally liable for oral slander as well as libel, and that without distinction as to the nature of the slander.[4] By the English law there is a criminal liability for words spoken, only when they are seditious, grossly immoral, or publicly injurious, as when addressed to a judicial officer in the execution of his duty, or when inciting to a duel or such like breach of the peace.[5]

Privilege to words spoken.

103. Words spoken may be privileged under the same circumstances as words written.

Libel or slander must be a false statement.

104. To be actionable, words, whether written or spoken, must be false. The truth is an answer to the action, not because it negatives the charge of malice (for a person may, wrong-

1 Ward *v.* Weeks, 7 Bing. 211; M'Pherson *v.* Daniels, 10 B. and C. 273.

2 Vicars *v.* Wilcocks, 2 Sm. L. C. 423.

3 *per* Lord Wenleysdale in Lynch *v.* Knight, 8 Jur. N. S. 724.

4 Penal Code, s. 499.

5 Mayne on P. C. p. 322.

fully or maliciously, utter slanderous matter though true, and thereby subject himself to an indictment), but because it shows that the plaintiff is not entitled to recover damages in respect of an injury to character which he either does not, or ought not to possess.[1] It is enough if the statement, though not perfectly accurate, is substantially true.[2]

105. The criminal liability is different. Formerly, on an indictment, it was not allowable to give in evidence the truth of the libel. Now, by an English statute, it is so, provided it is also shown, that it was for the public benefit that the slanderous matter charged should be published.[3] It is the same by the Penal Code.[4] Thus, it may be for the public benefit to make known the infidel opinions of a clergyman, or the adulterous practices of a physician, but not those of a barrister. Private life ought to be sacred, where there is no public benefit from publishing the private vices of another, though they may exist.[5]

Different rule as to criminal liability.

106. Lastly, to be actionable the matter must be shown to be defamatory.[6] If the matter is susceptible of a harmless meaning, or is equivocal, the plaintiff should give evidence of surrounding circumstances from which a libellous sense must be inferred.[7] Otherwise, language must be understood in the ordinary popular sense, and the effect of the language used, and not the meaning of the party uttering it, is the test of

Lastly the matter must be defamatory.

1 *per* Littledale, J. in M'Pherson *v.* Daniels, 10 B. & C. 272.
2 Alexander *v.* N. Eastern Ry. Co. 11 Jur. N. S. 619.
3 6 & 7 Vict. c. 96, s. 6.
4 Penal Code, s. 499, first exc.
5 Mayne on P. C. 325.
6 Miller *v.* David, L. R. 9 C. P. 118; Mulligan *v.* Cole, L. R. 10 Q. B. 551.
7 Broome *v.* Gosden, 1 C. B. 732.

its being actionable;[1] where the ordinary meaning is to be got rid of, evidence must first be given of something that would prevent the mere ordinary meaning being attached to the language, and then a witness may be asked what he understood by it.[2] So, if the language is equivocal, then (but only then) evidence of subsequent words of the same import may be given, so as to explain and point the libel charged.[3]

107. If the language directly points to no person in particular, evidence may be given to show who was meant. It is not necessary that all the world should understand the libel; it is sufficient if those who knew the plaintiff, can make out that he is the person meant.[4] Unless words are defamatory and disparaging, they are not actionable though special damage ensues.[5] To charge a man with ingratitude may be libellous.[6]

SLANDER OF TITLE.

108. It will be convenient to notice here the tort termed slander of title, though it is not a tort to the person, but to property. It is where one falsely and maliciously makes a statement disparaging the title of another in property, and this is followed by damage. So also an untrue statement disparaging the quality of a man's goods published without lawful occasion, and causing him damage is actionable.[7] There must be malice express or implied.[8] It is implied when a stranger, having no interest, interferes to make the assertion. But where one is

1 Roberts *v.* Camden, 9 East, 96; Hankinson *v.* Bilby, 16 M. & W. 442.
2 Daines *v.* Hartley, 3 Exch. 200.
3 Pearce *v.* Ormsby, 1 M. and Rob. 456.
4 Bourke *v.* Warren, 2 C. & P. 310.
5 Kelly *v.* Partington, 5 B. and Ad. 651.
6 Cox *v.* Lee, L. R. 4 Exch. 284.
7 Western, &c. Co. *v.* Lawes Co. L. R. 9 Exch. 222.
8 Brooke *v.* Rawl, 4 Exch. 524.

himself interested, or reasonably believes himself interested, in the property, and to protect himself makes the statement, he is not liable if he acted in good faith, unless he must have known that there was not the slightest pretence for his interference.[1] The statement must be false, for if there be the infirmity of title suggested, no action will lie, however malicious the defendant's intention may have been.[2] Lastly, actual damage must have ensued from the statement.[3] The slander may be of title in lands or chattels.

INVASION OF OTHER PERSONAL RIGHTS.

109. For the invasion of a right to a franchise, dignity, office, or privilege, substantial damages may be recovered without showing special pecuniary damage. The right is a personal one, and may exist by express law, established usage, or authoritative grant, and may be one enjoyed by a class collectively, or by each member severally of a class, or exclusively by one person. The right to vote at an election for a public office, or to be a candidate for the same, is such a right; and, if the officer conducting the election, maliciously infringes such right, he will be liable, but not if he has acted honestly, and to the best of that judgment and discretion which it is his duty to exercise.[4] The usurper of a dignity is guilty of a wrong which is, to a certain degree, prejudicial to every one who has a just title to the dignity; but, in England, the grantee of a dignity from the crown cannot have an action against another who, without a grant, assumes the same

—as a right of franchise.

—a dignity.

1 Hargrave *v.* LeBreton, 4 Bur. 2423; Pitt *v.* Donovan, 1 M. & S. 648; Steward *v.* Young, L.R. 5 C.P. 122; Wren *v.* Weild, L.R. 4 Q.B. 730.

2 Pater *v.* Baker, 3 C.B. 868.

3 Malachy *v.* Sloper, 3 Sc. 737.

4 Ashby *v.* White, 1 Sm. L. C. 185; Tozer *v.* Child, 7 E. and B. 381.

dignity. Whether the law of India would allow an action is uncertain.[1] The invasion of an exclusive right to a dignity or office to which emoluments are attached, will be ground for an action, but such an injury is rather to be classed as one to personal property. The honorary office of trustee of a religious endowment, or the right to exercise the privileges of head of a caste, may be the subject-matter of a civil action, and, therefore, the invasion or interruption of them may be punished by damages. So, the right to a religious office, exclusively or in rotation, and with or without the advantage of fees, or the right to eject such an office-bearer for sufficient cause, may be the subject of a civil action; but a claim to an exclusive privilege of taking a certain part in religious ceremonies, or a claim to have them conducted in a certain manner, is not a matter within the jurisdiction of ordinary civil tribunals. So, the religious or other office must be certain and exclusive, and not one the duties of which it is at the option of others to employ the holder to perform.[2] There is no exclusive right or privilege to exercise a particular trade or calling in a local community.[3] It seems that the invasion of such a privilege, as the right to go in procession or to appear in public with certain insignia or ceremonies, if exclusive, and derived from the grant of a competent authority, and not opposed to public rights, policy, or morality, would be the subject of an action for damages.[4]

—an exclusive office.

—an exclusive privilege.

1 Sri Sunker, &c. *v.* Sidha, &c. 3 Moore's I. A. C. 217.

2 For decisions in India—see Macpherson's Procedure (4th ed.) 38—41; Morley's Dig. 539. Id. N. S. 347; Madras Decisions 1856, p. 198; see also 9 Moore's I. A. C. 344; and the case of the Câzee of Bombay in Supreme Court, 25th April 1861.

3 2 Madras S. Decrees, 77, 83.

4 3 Moore's I. A. C. 198, but the point was not decided.

110. Except slander of title, the preceding torts fall within the first general class of torts by the invasion of a right. The next instances given will be of torts to the person falling within the second class, or torts by the breach of some public duty followed by special damage. Of these, torts to the person arising out of negligence, are a numerous class. Every one has a right to use a public thoroughfare, but he must exercise his right with reasonable care, and is liable for the consequences of negligence in the use of it. A person in driving is not bound to keep to the regular side of the road, but if he does not, he is bound to use a greater degree of caution than if he kept to the proper side.[1] And, generally, disobedience to the rule of the road is evidence against the driver.[2] So, a foot passenger is not bound to keep to the side of the road, and he is entitled to the exercise of reasonable care by drivers; still he is as much bound to look out for vehicles coming along, and not negligently to run against the horses, as a driver is bound to be vigilant in not running against him.[3]

Torts by breach of a public duty.

NEGLIGENT USE OF PUBLIC ROAD, &C.

111. In these cases a master or principal may be liable for the negligence of his servant or agent, and the principles governing the liability are applicable, generally, to all cases of torts, whether to property or person.

General rules as to liability of master for neglect, &c. of servant.

112. The general rule is, that the principal is liable civilly (and, in some cases, criminally), for the frauds, torts, negligences, malfeasances

Liability of master or principal.

1 Pluckwell v. Wilson, 5 C. and P. 375.

2 Smith v. Voss, 26 L. J. 239 Exch.

3 Cotton v. Wood, 7 Jur. N. S. 168; 8 C. B. N. S. 571.

and omissions of his agent, when done in the course of his employment, though not sanctioned but even forbidden by the principal. The rule applies, *let the superior answer for it*, for he holds out his agent as competent, and so warrants his fidelity, skill, and good conduct in all matters within the scope of his agency.[1] An instance of his being liable criminally is where the owner of works carried on for his profit by his agents, is liable to be indicted for a public nuisance caused by acts of his workmen in carrying on the works, though done by them without his knowledge and contrary to his general orders.[2] But if the act was not done in the course of his employment, but while the servant or agent was solely engaged upon some purpose of his own, or if the act was simply wilful or malicious on his part, or beyond the scope of his authority express or implied, the master is not answerable.[3] It is a question of fact whether a particular act is within the scope of the employment, though not in the ordinary course of it.[4]

113. Hence the other general rule, that a servant or agent is not liable to others, but only to his master, for the consequences of non-feasance or wrongful omissions; the master alone is liable for such. But for misfeasances or positive wrongs, the servant or agent may also be made liable to others.[5] Thus, if the servant of a blacksmith in shoeing a horse, from negligence, lames him, the master alone is liable, viewing this as a mere

Liability of servant, or agent.

1 Story on Agency, § 452.

2 Reg. *v.* Stephens, L. R. 1 Q. B. 702.

3 General Omnibus Co. *v.* Limpus, 9 Jur. N. S. 333; Edwards *v.* L. and N. W. Ry. Co. L. R. 5 C. P. 445; Walker v. S. E. Ry. Co. ibid. 640; Story *v.* Ashton, L. R. 4 Q. B. 476.

4 Burns *v.* Poulson, L. R. 8 C. P. 567.

5 Story on Agency, § 308-9; 2 Hilliard, 464.

non-feasance as some do; but if he did it maliciously, an action will lie personally against the servant.[1] If a servant wantonly, and not in the execution of orders, strikes the horses of another, and so produces an accident, the master is not liable; but if he does so in the course of his employment, though injudiciously, the master as well as the servant is liable.[2] If a master gives a servant authority to do acts, in the course of his employment, which require discrimination, and the servant performs such acts injudiciously, the master is liable for the consequences to third persons.[3] But where the act would not be within the scope of his authority though done properly, the master is not liable; thus where a Railway Company would have had no authority in the circumstances to arrest a passenger, there can be no implied authority from them to their station master to make the arrest.[4]

Liability when the act is lawful or otherwise.

114. Where one employs another to do an act which may be done in a lawful manner without injury to others, and the latter unnecessarily does it so as to cause damage to a third person, the employer will not be responsible, unless there is the relation of master and servant between them.[5] But it is otherwise, if the act he employs the other to do, is itself unlawful; then he is liable though the person employed was a contractor, and the act was done by the servants of such

1 Story on Agency, § 310, 453.

2 Story on Agency, § 456; McManus *v.* Cricket, 1 East, 106; Croft *v.* Alison, 4 B. and Ald. 590.

3 Greenwood *v.* Seymour, 8 Jur. N. S. 214; Bayley *v.* M. S. & L. Ry. Co. L. R. 7 C. P. 415 and 8 C. P. 148; Moore *v.* Metr. Ry. Co. L. R. 8 Q. B. 36.

4 Poulton *v.* L. S. W. Ry. Co. L. R. 2 Q. B. 535; Allen *v.* L. S. W. Ry. Co. L. R. 6 Q. B. 65; Bolingbroke *v.* Swindon L. B., L. R. 9 C. P. 575; Lucas *v.* Mason L. R. 10 Exch. 251.

5 Butler *v.* Hunter, 31 L. J. 214 Exch.

contractor.[1] So, where the principal was a wrongdoer, the agent, however innocent in intention, is also a wrongdoer. But then, where the act was not unlawful in itself, the rule that there is no contribution between wrongdoers,[2] does not apply, and the agent may have his remedy over against the principal, for the law will imply a promise to indemnify him.[3]

Liability of the master of a ship for acts of crew.

115. Generally, where the act was that of a sub-agent employed by the authority of the principal, the latter alone is liable. An exception is the master of a ship, who, from the necessities of commerce, is treated as a qualified owner, and is responsible for acts or omissions of his crew done in the course of their employment.[4] He is treated as a common carrier whether of goods or passengers; and where the pilot of a steam-boat was appointed by the owner, and a collision took place while the vessel was under his exclusive control, the master was held liable, for it is his own fault if he will take the place of master with such people as the owner appoints: for, otherwise, the owner might separately appoint every man in the ship, and there would be no remedy except against the common sailor who was at the wheel, or the owner, who might be unknown, or reside in a foreign country.[5] But if the act was wilful, and not in the course of the duty of the person committing it, as where the other boat was wilfully run into, then neither the master nor owner

1 Ellis *v.* Sheffield Gas Co. 2 E. and B. 767.

2 For this rule, see the Leading case of Merryweather *v.* Nixan, 2 Sm. L. C. (6th ed.) 421; see also 1 Evan's Pothier on Oblig. 166, and a case in 7 Calc. W. R. 384, Civil Rulings.

3 Adamson *v.* Jarvis, 4 Bing. 66; Story on Agency, § 339, 340.

4 Story on Agency, § 314.

5 Id. 317 and note; 456, a. The English Acts regulating the extent of liability on collision are the 17 & 18 Vict. c. 104, and 25 and 26 Vict. c. 63.

is liable.[1] And neither master nor owner is liable, where the damage is from the fault of the pilot, and the employment of the pilot was compulsory.[2]

116. The above general rules as to torts done by agents in the course of their agency or employ, are not applied to public agents. The State is not liable for their misfeasances or non-feasances, for it cannot guarantee the fidelity of its agents.[3] So, the head of a department, where he has not authorized or co-operated in their acts, is not liable for his subordinates, unless he has been guilty of negligence in selecting or superintending them; for, otherwise, who could safely serve the State? Generally also, his power of appointing and dismissing subordinates is limited.[4] Thus the Postmaster General is not liable for the amount of a bank note stolen out of a letter by a post office servant.[5] But the subordinate himself will be liable, and even though he acted in good faith, for he is bound to reasonable skill and diligence in the execution of his trust. But he is not liable for a damage, where there has been no excess or misuse of authority.[6]

Non-liability of public officers or agents.

117. The same rule is extended in favor of others not strictly public agents, but acting gratuitously for public purposes, as road, or municipal commissioners. Where the acts are within their authority, they are not liable for an imperfect execution of their orders, or for a misfeasance not directed by them. That they should be encouraged to act is for the

—of persons acting gratuitously for public purposes.

1 Story on Agency, § 318.
2 17 and 18 Vict. c. 104, s. 388.
3 Story on Agency, § 319.
4 Ibid, and see infra § 313.
5 Lane *v.* Cotton, 1 Ld. Raym. 646; Whitfield *v.* Le DeSpencer, 2 Cowp. 754.
6 Story on Agency, § 319, b. 320; Whitfield *v.* Le DeSpencer supra.

public good, and they derive no personal benefit therefrom.[1] Where the acts are beyond their authority, their officer though bound to obey their orders, is yet liable for the injury.[2] This exemption will not include bodies corporate formed for trading or other profitable purposes, though acting without reward to themselves; their liability is the same as that of individual owners of similar works, for whom in fact they are mere substitutions.[3]

118. So, officers in the army or navy are liable only for their own acts and negligences. A captain is not liable for the damage for a collision, where a lieutenant had the watch, and the captain was not upon deck, nor called there by his duty. He did not appoint his lieutenant, and he is obliged to serve in any ship with any crew as ordered. The preceding rules and exceptions are applicable equally where the damage is to property as to person.[4] The Crown can do no wrong, and hence there is no right of action against the Crown for a claim founded upon tort. But the civil irresponsibility of the supreme power for tortious acts could not be maintained with any show of justice if its agents were not personally liable for them. Hence if the act is in itself wrongful as against the plaintiff, and causes damage to him, he has the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorised, or whether it were done by order of the supreme power.[5]

—of officers of the army or navy.

1 Duncan *v.* Findlater, 6 Cl. and Fin. 894; Hall *v.* Smith, 2 Bing. 156; and see Holliday *v.* St. Leonards, 8 Jur. N. S. 79; Story on Agency, § 320.

2 Mill *v.* Hawker, L. R. 10 Exch. 92.

3 Mersey Docks *v.* Gibbs, L. R. 1 H. L. 93; Winch *v.* Thames Cons. L. R. 7 C. P. 458 and 9 C. P. 378; Joliffe *v.* W. L. Board, L. R. 9 C. P. 79.

4 Story on Agency, § 322; Nicholson *v.* Mounsey, 15 East, 384.

5 Tobin *v.* Reg. 10 Jur. N. S. 1029; Rogers *v.* Rajendro, 8 Moore's I. A. C. 131; see Broom's Constitutional Law, 619—21, and 719—25.

119. Another question often calling for decision is, whether the relation of master and servant exists between the party sought to be made liable and the actual wrongdoer. The point for enquiry is, who had the selection of the person causing the damage, and under whose orders and efficient control was he, when it was caused?[1] If A hires a pair of horses for his carriage from B, and B sends also the driver, then B, and not A, is liable for the negligence or want of skill of the driver resulting in damage to others.[2] But if A takes upon himself to give any special directions to the driver, or interferes so as to take the actual management of the horses into his own hands, A becomes responsible.[3]

Test of the relation of master and servant.

120. The employer is responsible for the acts of his servant, whether the work is done by a domestic servant, or day-labourer, or by a person who works by the job or piece, and contracts to do the work for a specific sum; provided always, that the workman is an ordinary labourer personally engaged in the execution of the work, acting under the control of the employer, and not a contractor exercising an independent employment, and selecting his own servants and workmen for the performance of the work.[4]

Servant and contractor distinguished.

121. Where a servant, as a steward or manager, hires workmen to do his master's work, the latter is alone liable

1 Story on Agency, § 453 a; Abraham *v.* Reynolds, 6 Jur. N. S. 53; Hibbs *v.* Ross, L. R. 1 Q. B. 534; Murray *v.* Currie, L. R. 6 C. P. 24; Rourke *v.* White Moss C. Co. 1 C. P. D. 559.

2 Laugher *v.* Pointer, 5 B. and C. 547; Quarman *v.* Burnett, 6 M. and W. 499.

3 Ibid. Story on Agency, § 455.

4 Story on Agency, § 454; Holmes *v.* Onion, 26 L. J. 263 C. P.; Sadler *v.* Henlock, 4 E. and B. 578.

for the defaults of such workmen.[1] But if A entrusts work to B, who exercises an independent employment, and has the sole and immediate control over the workmen engaged, (for if A does a part or exercises some control over the execution of the work, A continues liable,)[2] B is a contractor, and alone liable to third parties, unless a nuisance is thereby created and continued to A's knowledge on his own premises, or unless the work was itself unlawful.[3] Hence where a duty is cast on a person to do an act he cannot relieve himself from liability by employing a contractor who does it improperly.[4] There is a difference between committing work to a contractor from which, if properly done, no injurious consequences can arise, and handing over to him work from which mischievous consequences will arise unless preventive measures are adopted. In the former case, the contractor alone is liable,—the act being lawful, and his negligence a casual act in the course of doing it;—in the latter both are liable; for the injury arises from the act contracted to be done, and the principal cannot shift his responsibility on to the agent employed to do it.[5] If A contracts with B to repair his house, and B contracts with C for the materials, and C's men place the materials on the road near the house, so that D at night falls over them and is hurt, A is not, it seems now settled, liable to D.[6] If A employs a cooly maistry to remove bales from his godown, and by the

1 Stone *v.* Cartwright, 6 T. R. 411.

2 Pendlebury *v.* Greenbalgh, 1 Q. B. D. 41.

3 Cuthbertson *v.* Parsons, 12 C. B. 304; Ellis *v.* Sheffield Gas Co. 2 E. & B. 767; Welfare *v.* L. and B. Ry. Co. L. R. 4 Q. B. 693; Murray *v.* Currie, L. R. 6 C. P. 24; Taylor *v.* Greenbalgh, L. R. 9 Q. B. 489.

4 Gray *v.* Pullen, 5 B. & S. 970; 34 L. J. (Q. B.) 265.

5 Bower *v.* Peate, 1 Q. B. D. 326.

6 Bush *v.* Steinman, 1 B. and P. 409, contra must now be viewed as bad law. Knight *v.* Fox, 5 Exch. 721; Story on Agency, § 454.

negligence of the coolies a passer-by is hurt, it seems that the relation of master and servant does exist between A and the coolies, and he will be liable.[1] In the first case, if A had sanctioned the nuisance of placing the materials on the road, or had retained to himself any control over the workmen, he would be liable.[2] In the second case, if B had sent the maistry to fetch away the bales, and A had merely permitted him to use his crane and tackle, then B, and not A, would be liable as master.[3] A contractor having once properly completed his work is not liable for a damage caused by a defect subsequently arising.[4]

Contractor and sub-contractor.

122. Similarly, if one contracts for the performance of an entire work, and then sub-contracts for a portion of the work, and that is done under the immediate control and superintendence of the sub-contractor, the latter is alone liable for any wrong done by his workmen.[5] As, if A contracts to build a house, and then sub-contracts with B to put up the roof.[6] Generally if the injury is from the negligence of one of several co-proprietors all will be responsible;[7] but there may be special circumstances amounting to the hiring of the share of A by B, so as to exclude the liability of A.[8]

Doctrine of contributory negligence.

123. Another principle, applicable alike to torts to the person or property arising out of negligence, is what is called, the doctrine of contributory negligence. If the plaintiff so far con-

1 Randleson *v.* Murray, 8 Ad. & E. 109; see also Serandat *v.* Saisse, L. R. P. C. 152, infra. § 199.

2 Addison, 145; 2 Hilliard, 447.

3 Abraham *v.* Reynolds, 6 Jur. N. S. 53; Murphy *v.* Caralli, 10 Jur. N. S. 1207; 2 Hilliard, 446 (n.)

4 Hyams *v.* Webster, L. R. 4 Q. B. 138.

5 Story on Agency, § 454 a.

6 Rapson *v.* Cubitt, 9 M. & W. 710.

7 Moreton *v.* Harderu, 4 B. and C. 223.

8 Bernard *v.* Aaron, 9 Jur. N. S. 470.

tributed to the damage by his own want of ordinary care and caution, that, but for such negligence or want of care, the misfortune would not have happened, he is the author of his own wrong. But mere negligence will not disentitle the plaintiff, unless by the exercise of ordinary care he might have avoided the consequences of the defendant's negligence;[1] or if the defendant might, by the exercise of caution on his part, have avoided the consequences of the neglect or carelessness of the plaintiff.[2] Thus, if the plaintiff has wrongfully or negligently left his cattle or goods on the road, the defendant may not drive over them, if, by care, he might avoid doing so.[3] Where the plaintiff is not himself in any fault, but the injury to him arises from the combined or contributory negligence of two separate persons employed to do separate things, the plaintiff may sue either or both.[4] A servant may be so identified with his master that he cannot recover though he suffers from the negligence of another, if there was such contributory negligence by the master as would have been a defence as against him.[5]

124. But if, by reason of the wrongful act of the defendant, the plaintiff incurs some risk, the mere knowledge of the danger is no defence to the damage caused by the negligence of defendant; unless the plaintiff voluntarily incurred danger so great that no sensible man would have incurred it; thus, if defendant wrongfully digs a ditch across a public road, and the plaintiff, in

Where plaintiff has run some risk.

1 Bridge *v.* G. Junction Ry. Co. 2 M. and W. 244; and see notes to Ashby *v.* White, 1 Sm. L. C. 219 (4th ed.); and 1 Hilliard, 144, 160.

2 Radley *v.* L. & N. W. Ry. Co. L. R. 9 Exch. 71 and 10 Exch. 100.

3 Tuff *v.* Warman, 5 C. B. N. S. 573.

4 Burrows *v.* March, Gas Co. L. R. 5 Exch. 71, and 7 Exch. 96; Gee *v.* Metr. Ry. Co. L. R. 8 Q. B. 161.

5 Child *v.* Hearn, L. R. 9 Exch. 176.

attempting to cross it, is hurt, he may recover damages, if the danger which the plaintiff, under the circumstances, elected to run, was not such as to render it altogether an unreasonable and imprudent act on his part.[1] But wilfully exposing oneself to a known danger, especially where in case of injury an action for damages is calculated upon, is not justifiable.[2] So the alternative of suffering a slight inconvenience will not justify the risking of serious danger to avoid it; it is otherwise, if the inconvenience is so great that it is reasonable to get rid of it by an act not obviously dangerous and executed without carelessness.[3] Thus a passenger ought not to get out when it is obviously dangerous to do so;[4] or if the train is not brought to a final stand, and there is light and an obvious danger;[5] though where the train has been brought to a final standstill, and the place is dark and dangerous, this will be negligence on the part of the company.[6] Whether calling out the name of a station is an invitation to the passengers to alight will depend upon the circumstances of each case.[7]

Defence of accident without default.

125. The defendant may show that the damage was the result of an inevitable accident, and not through any default of his; as that his horse was frightened by a clap of thunder, or by

1 Clayards *v.* Dethick, 12 Q. B. 439; Thompson *v.* N. Eastern Ry. Co. 7 Jur. N. S. 307; 8 Jur. N. S. 991; but see Wyatt *v.* G. W. Ry. Co. 11 Jur. N. S. 825.

2 Dunn *v.* Birmingham C. Co. L. R. 7 Q. B. 261.

3 Adams *v.* L. and Y. Ry. Co. L. R. 4 C. P. 739; Robson *v.* N. E. Ry. Co. L. R. 10 Q. B. 271; see also Siner *v.* G. W. Ry. Co. L. R. 4 Exch. 171 and Cockle *v.* L. and S. E. Ry. Co. id. 5 C. P. 457, in which there was much difference of opinion on the facts.

4 Bridges *v.* N. L. Ry. Co. L. R. 6 Q. B. 377 and 7 H. L. 213.

5 Lewis *v.* L. C. and D. Ry. Co. L. R. 9 Q. B. 66.

6 Cockle *v.* L. and S. E. Ry. Co. L. R. 7 C. P. 321; Weller *v.* L. B. Ry. Co. 9 C. P. 126.

7 Bridges *v.* N. L. Ry. Co. supra.

the noisy approach of a cart, or by tom-toms, and so became ungovernable.[1] But where the facts are such as to establish a *primâ facie* case against the defendant, the burden of proving that he was without default, is on him.[2] The degree of care to be exercised on any occasion, as for instance, in using a public thoroughfare, depends greatly upon the damage likely to result to others from the want of care; thus, a man who traverses a crowded street with edged tools, or bars of iron must take especial care that he does not hurt others, and is bound to keep a better look out, than the man who merely carries an umbrella.[3]

Where there has been default, but no intention to hurt.

126. But though he did not intend it, and his was not the hand that did the damage, yet defendant may be liable, if the damage was the legal and natural consequence of his negligence or misfeasance. Thus, if a squib is thrown amongst a crowd in a public place, and is then tossed from one person to another, the first thrower and all who tossed the squib otherwise than in pure self-defence, are responsible for the damage it occasions.[4] So, generally, if one is guilty of negligence in leaving anything dangerous in a place where he knows it to be extremely probable, that some other person will unjustifiably set it in motion to the damage of a third party, and if that damage should be so brought about, the sufferer may have redress by action against both or either of the two, but unquestionably against the first. Thus, if a man puts a gun in a place where children are playing, and one child fires it, and hurts another, the man is liable.[5] But in the

1 Wakeman *v.* Robinson, 1 Bing. 213; Gibbons *v.* Pepper, 1 Ld. Raym. 38.

2 Byrne *v.* Boadle, 10 Jur. N. S. 1107.

3 Addison, 327.

4 Scott *v.* Shepherd, 1 Sm. L. C. 343.

5 Lynch *v.* Nurdin, 1 Q. B. 36; see 1 Hilliard, 163 for American cases.

absence of negligence by the defendant, the fact of the plaintiff being a young child is immaterial, if he improperly meddled with that which would not have hurt him if he had left it alone; and so, if he had been an adult, could not have sued.[1] So, if a cart and horse are left by the owner in the street unattended, and one passing strikes the horse, both are liable for the damage.[2]

Proximate cause of injury alone to be regarded.

126 *a*. A further principle applicable alike to torts to the person or to property arising out of negligence, is that the proximate and not the remote cause of the injury is to be regarded. If the defendant was the author of the main and efficient cause of the injury he is liable, though all the consequences of his negligence might reasonably not have been anticipated by him;[3] or, though but for the intervention of the neglect or fault of a third person his own negligence might have proved harmless.[4] But he is not liable where his act was not the direct cause of the injury and taken by itself was not a breach of duty towards the plaintiff.[5] These cases on the remoteness of the cause of an injury are to be distinguished both from the cases on the remoteness of a damage as the result of any injury,[6] and from those cases where the defect is in the absence of any duty from the defendant to the plaintiff in relation to the cause, though operating directly, from which the plaintiff has suffered.[7]

1 Hughes *v.* Macfie, 10 Jur. N. S. 682; Mangan *v.* Attarton, L. R. 1 Exch. 239.

2 Illidge *v.* Goodwin, 5 C. & P. 192.

3 Smith *v.* L. and S. W. Ry. Co. L. R. 6 C. P. 14.

4 Burrows *v.* March, Gas Co. L. R. 5 Exch. 67; Collins *v.* M. L. Comsrs. L. R. 4 C. P. 279; Harrison *v.* G. N. Ry. Co. 10 Jur. N. S. 992; Romney Marsh *v.* Trinity House, L. R. 5 Exch. 204, and 7 Exch. 247.

5 Harrison *v.* G. N. Ry. Co. supra.

6 See infra. § 348—51.

7 See infra § 152.

127. Another instance of tort to the person is from the negligent keeping of animals either wild or domestic. Any one who keeps a wild animal, as a tiger or bear, which escapes and does damage, is liable without any proof of notice of the animal's ferocity; but where the damage is done by a domestic animal, the plaintiff must show that the defendant knew the animal was accustomed to do mischief.[1] But the gist of the action is not the negligent keeping, but the keeping with knowledge of the mischievous propensity, whether the animal be of a savage or domestic nature.[2] A single instance of ferocity is sufficient notice, or even a knowledge that it has evinced a savage disposition by attempting to bite;[3] and there is no difference between a corporation and an individual as to what is such notice.[4] The knowledge of the servant who keeps the animal as to its ferocity is the knowledge of the master.[5] If a horse is negligently suffered to stray into a road, or on to another's land, and does damage by kicking, the owner is liable though the horse was not vicious.[6] But a man is entitled to keep a ferocious dog for the protection of his premises, and to turn it loose therein at night.[7] He has, though, no right to put a ferocious dog in such a situation in the way of access to his house, that a person, innocently coming there for a law-

NEGLIGENT KEEPING OF ANIMALS.

1 Rex *v.* Huggins, 2 Ld. Raym. 1583; Hudson *v.* Roberts, 6 Exch. 697.

2 Jackson *v.* Smithson, 15 M. and W. 563; May *v.* Burdett, 9 Q. B. 110. By the 28 and 29 Vict. c. 60 such knowledge need not in certain cases be shown; on this see Wright *v.* Pearson, L. R. 4 Q. B. 582.

3 Worth *v.* Gillings, L. R. 2 C. P. 1.

4 Stiles *v.* Cardiff, S. N. Co. 10 Jur. N. S. 1199.

5 Baldwin *v.* Casella, L. R. 7 Exch. 325; Applebee *v.* Percy, L. R. 9 C. P. 647.

6 Lee *v.* Riley, 11 Jur. N. S. 527, and cases in 1 Hilliard, 648, 652. Cox *v.* Burbridge, 9 Jur. N. S. 970 seems questionable. See Reg. *v.* Dart, 11 Jur. N. S. 549.

7 Brock *v.* Copeland, 1 Esp. 203.

ful purpose in the day-time, may be injured by it.[1] But one may not shoot a dog though he is ferocious; to justify that, it must be actually attacking the shooter at the time.[2]

128. So, there is a public duty on the owner of land so to use his property as not to injure others. The improper user of land more often results in damage to property than to the person; thus, nuisances, as by carrying on noisy or offensive trades on one's premises, may more conveniently be treated as injuries to property; since though hurtful to the health or repose of others, the actual damage may be better judged of by the consequently deteriorated value of adjacent property, resulting from its being rendered more or less unfit for habitation. But there are some cases of negligent user of real property which are simply torts to the person; thus, the occupier of a house in a town is bound to fence in his cellar, area, or well abutting upon the road, and if an accident happens therefrom to a person, it is no defence that the premises had been in the same state for many years before the defendant came into possession of them;[3] or that he employed a proper person to put them in repair who did it negligently.[4] But there may be a dedication of land by the owner as a highway subject to an existing risk or inconvenience, and then he will not be liable, for the public take the road as it is.[5] So, a person using a public navigable river is bound to use reasonable skill and care to prevent mischief to other vessels. But if his vessel is sunk without any default on his part, as by a

NEGLIGENT USER OF REAL PROPERTY.

1 Sarch *v.* Blackburn, M. and M. 505.

2 Morris *v.* Nugent, 7 C. and P. 572.

3 Coupland *v.* Hardingham, 3 Camp. 398; Hadley *v.* Taylor, L. R. 1 C. P. 53; Pretty *v.* Bickmore, L. R. 8 C. P. 401.

4 Tarry *v.* Ashton, 1 Q. B. D. 314; Bower *v.* Peate, 1 Q. B. D. 329.

5 Fisher *v.* Prowse, 8 Jur. N. S. 1208; Robins *v.* Jones, 10 Jur. N. S. 239.

cyclone, he is not bound to remove it, though it may be an obstruction; nor is he liable for the accidents it causes, if he ceases to have possession of or control over it. But the owner or a purchaser retaining possession would be liable.[1]

129. Thus a railway company may be liable for injuries to persons using the level crossings on the line, or from defects in their stations; but each case will depend on its own circumstances.[2] So, every occupier of land who allows wells or shafts to remain unguarded, is liable in damages to persons falling into them, provided they were lawfully traversing the land, and there was no negligence on their part.[3] So, if strangers are allowed to use a private way across land, or a particular pathway is used as the ordinary means of access to a dwelling house, liability will be incurred by neglecting to fence off dangerous places adjoining such way.[4] But there is no liability, where a person strays off the road or pathway, though he does so in the night, provided the dangerous place was not immediately adjacent to the way.[5] If there is leave to cross a field, &c. by several ways, and a man uses the more convenient but more dangerous way, and suffers,

Instances of

1 Brown *v.* Mallett, 5 C. B. 599; White *v.* Crisp, 10 Exch. 312; Romney Marsh *v.* Trinity House, L. R. 5 Exch. 204.

2 For cases in which there was held to be sufficient evidence of negligence, see Stapley *v.* L. B. and S. C. Ry. Co. L. R. 1 Exch. 21, and Lunt *v.* L. and N. W. Ry. Co. id. 1 Q. B. 277; Wanless *v.* N. E. Ry. Co. L. R. 6 Q. B. 481 & 7 H. L. 12; Williams *v.* G. W. Ry. Co. L. R. 9 Exch. 157; Oliver *v.* N. E. Ry. Co. L. R. 9 Q. B. 409; and for cases very similar but where there was held to be no such evidence, see Stubley *v.* L. and N. W. Ry. Co. L. R. 1 Exch. 13; Shelton *v.* L. and N. W. Ry. Co. id. 2 C. P. 631; Cliff *v.* Midland Ry. Co. id. 5 Q. B. 258; and see also Crafter *v.* Met. Ry. Co. id. 1 C. P. 300, and Welfare *v.* L. and B. Ry. Co. id. 4 Q. B. 693; Ellis *v.* G. W. Ry. Co. L. R. 9 C. P. 551.

3 Hardcastle *v.* S. York Ry. Co. 28 L. J. 139 Exch.

4 Corby *v.* Hill, 27 L. J. 318 C. P.; Lancaster C. Co. *v.* Parnaby, 11 Ad. and E. 223.

5 Hounsell *v.* Smith, 6 Jur. N. S. 897.

the owner is not liable.[1] So where a passenger travels free 'at his own risk,' this condition will include the risk of injury from the defective state of the company's premises.[2] A third party, having leave to place building materials on a private road, and placing them so negligently that another lawfully using the road is hurt, will be liable to him in damages.[3] So there is a duty on a dock company to parties visiting ships to keep the gangways from one ship to another in a secure state.[4] So, a shopkeeper, who invites the public to his shop is liable for having a trap door open without any protection, by which his customers suffer.[5] Where plaintiff was hurt whilst employed on defendant's premises by falling down an unfenced hole which was unreasonably dangerous to persons not usually employed on the premises, the defendant was held liable.[6] So, if a stand on a race course is negligently constructed, and one is thereby hurt, those who caused it to be erected and received the entrance money, will be liable, though personally free from negligence.[7] So also a carrier of passengers is liable where the station or starting place used by him is dangerous even though it is not under his exclusive control.[8] So, generally, a man may not make dangerous excavations near a public highway, nor do any other act, as discharging fire-arms near such road, likely to result in damage to others.[9] Where there is no duty to

1 Bolch *v.* Smith, 8 Jur. N. S. 197.

2 Gallin *v.* L. and N. W. Ry. Co. L. R. 10 Q. B. 212.

3 Corby *v.* Hill, supra.

4 Smith *v.* London, &c. Co. L. R. 3 C. P. 326.

5 Lancaster C. Co. *v.* Parnaby, supra; but see Wilkinson *v.* Fairrie, 9 Jur. N. S. 280; Holmes *v.* N. E. Ry. Co. L. R. 4 Exch. 254, and 6 Exch. 123.

6 Indermaur *v.* Dawes, L. R. 1 C. P. 274, S. C. id. 2, C. P. 311.

7 Francis *v.* Cockrell, L. R. 5 Q. B. 184, S. C. ibid. 501.

8 John *v.* Bacon, L. R. 5 C. P. 437; see also Terbutt *v.* B. and E. Ry. Co. L. R. 6 Q. B. 73, where the same station is used by several companies.

9 The law is so in England by 5 and 6 W. 4, c. 50, ss. 70 and 72; but clearly on general principles the act is a wrong.

fence or protect a dangerous spot, there is no liability from the use of an obviously defective protection, but it might be otherwise from the use of a defective means of protection concealing the danger, and so serving as a trap.[1] There must be something like fraud on the part of the owner in this respect, otherwise the mere permissive use of a close in which are dangerous places, does not render the owner liable.[2]

130. So, a landlord is responsible if he leases to another a house adjoining a road, which, from age or faulty construction, is dangerous and damages others.[3] If it became so after he leased it, he is not liable, unless he was bound to keep it in repair.[4] The occupier is also liable, provided he knew, or ought to have known, that the house was in a dangerous state, and chose to become and continue the occupier of it, with knowledge of its dangerous condition.[5] But the landlord is not liable to the tenant, unless he agreed to keep the house in repair, though the roof falls in and hurts the tenant or his family.[6]

Dangerous buildings.

131. So, the public duty may be one arising out of express enactment. Thus, a railway company is bound to keep their stations sufficiently well-lighted to guide and direct strangers who are wholly unacquainted with the locality.[7] If persons are allowed to cross the line at the stations, the company is bound to have persons or other means for pointing out the

Public duty arising from express law.

1 Belch v. Smith, 8 Jur. N. S. 197.

2 Gautrel v. Egerton, L. R. 2 C. P. 371.

3 Todd v. Flight, 7 Jur. N. S. 291; Pretty v. Bickmore, L. R. 8 C. P. 401.

4 Payne v. Rogers, 2 H. Bl. 350.

5 Reg. v. Watts, 1 Salk. 357.

6 Gott v. Gaudy, 2 E. and B. 845.

7 Martin v. G. Northern Ry. Co. 16 C. B. 180; Smith v. G. E. Ry. Co. L. R. 2 C. P. 4, is an instance of non-liability.

right place to cross.[1] A company is generally bound to fence its line and is then liable if cattle stray on to it through a defective fence, and are hurt.[2] So, a canal company is bound to take reasonable care to render the navigation of the canal safe, and where it intersects a road to have proper bridges, rails, and lights. And, generally, powers given by statute are not to be used to the peril of the lives or limbs of the Queen's subjects. They are to be exercised reasonably, and with due care, so as not, by negligence, to cause dangers to others.[3] And where such powers are conferred on parties partly for their own benefit, and are exercised for their own profit, such parties are answerable for the careless exercise thereof.[4]

Public agents acting gratuitously.

132. Commissioners and others acting gratuitously, (not however being commissioners or bodies corporate formed for trading or other profitable purposes[5]) are not liable, if they order a thing to be done which is within the scope of their authority and are not themselves guilty of negligence or misconduct in doing it. But their agent, contractors, and workmen will be personally answerable for damage done in the negligent execution of such work.[6] But in case of non-feasance, or a duty left undone, the general rule applies that the duty and liability of the employed are to the employer,—of the employer towards third parties;[7] and where such commissioners have a positive duty to perform, its omission

1 Birket *v.* Whitehaven, &c. 28 L. J. 348 Exch.

2 Dawson *v.* Mid. Ry. Co. L. R. 8 Exch. 8.

3 Manley *v.* St. Helen's C. Co. 27 L. J. 159 Exch.

4 Ibid.

5 Mersey Docks *v.* Gibbs, L. R. 1 H. L. 93, ante § 117; and Coe *v.* Wise, L. R. 1 Q. B. 711.

6 Duncan *v.* Findlater, 6 Cl. & F. 894; Holliday *v.* S. Leonards, 8 Jur. N. S. 79.

7 Pickard *v.* Smith, 10 C. B. (N. S.) 470.

is not excused by the want of funds at their disposal.[1] Commissioners are liable, though acting within their jurisdiction, if, having the means of knowledge, they remain negligently ignorant,[2] or, if they act wantonly and oppressively and cause unnecessary damage to individuals.[3] Where authorized public works have been executed, parties clothed with the possession of them are bound to maintain them in a proper state of security ; or if unable to do so, they ought to close them, or give notice of their condition ; otherwise they will be liable for damages sustained by persons using them.[4] Such are some of the general rules, but the liability is usually regulated expressly by the enactment in each case.

TORTS BY BREACH OF PRIVATE DUTY.

133. Next as to torts to the person by breach of some private duty. This may be a duty existing at common law, of which a private nuisance, resulting in damage to the person, may afford an example. When the nuisance is of a mixed kind, as productive of damage to the health or comfort of the person, and also causing depreciation in the value of property, it will be more convenient to consider it under the head of torts to property.

NEGLIGENCE OF PROFESSIONAL MEN.

134. When the damage results from the negligence or incompetency of a professional man, as a surgeon, the injury may be viewed, either as a breach of that duty which the law imposes upon a professional man to possess and exercise reasonable skill and care in treating his patients, or as a breach of an implied con-

1 Young v. Davis, 8 Jur. N. S. 286 ; Ohrby v. Ryde, &c. 10 Jur. N. S. 1048.

2 Mersey, &c. v. Penhallow, L. R. 1 H. L. 93 ; Jolliffe v. Wallasley, L. R. 9 C. P. 79 ; Winch v. Thames Cons. L. R. 9 C. P. 378.

3 Leader v. Moxton, 3 Wils. 461.

4 Gibbs v. Liverpool Docks, &c. 3 H. and N. 164 ; 4 Jur. N. S. 636 ; Mersey, &c. v. Penhallow, supra.

tract that he does possess such skill. And, hence, the party who suffers from the want of such skill and care, may have an action, though, under the circumstances of the case, there was no privity of contract between him and the surgeon.[1] But a surgeon is not bound to, nor does he impliedly undertake that he will, perform a cure, nor does he undertake to use the highest possible degree of skill, but he is bound, and does undertake, to bring a fair and competent degree of skill, and to exercise a reasonable degree of care and diligence.[2] Generally, the like rule applies to others exercising a public profession or calling, where their negligence results in personal damage to those on whose behalf they are employed. But one chosen to act as arbitrator is not liable for want of either skill or care, even though chosen because he exercises some particular profession or business. It is enough if he acts faithfully and honestly.[3]

LIABILITY OF CARRIERS OF PASSENGERS.

135. The liability of coach and transit proprietors, and others who are common carriers of passengers, is very similar in its nature. The liability for damage to their passengers resulting from negligence, does not arise from the contract, nor depend upon the fact of compensation being paid for the service; it is a duty imposed by law; and the promise to carry safely is implied from the duty, not the duty from the promise.[4] Hence even a passenger travelling gratuitously (unless he expressly agrees to travel at his own risk,) may recover damages;[5] even though he ought to have paid

1 See ante § 21.

2 Lamphier *v.* Phipos, 8 C. and P. 479.

3 Pappa *v.* Rose, L. R. 7 C. P. 32, 525; Tharsis S. Co. *v.* Loftus, L. R. 8 C. P. 1.

4 Story on Bailm. 590; Collett *v.* L. and N. W. Ry. Co. 16 Q. B. 989.

5 G. Northern Ry. Co. *v.* Harrison, 10 Exch. 376; McCawley *v.* Furness Ry. Co. L. R. 8 Q. B. 57.

a fare, but without fraud did not do so;[1] but one who is not a common carrier but carries another gratuitously, is liable only for gross negligence.[2] Where a person expressly agrees to travel at his own risk, the condition applies to the whole journey, though it may be on more than one line.[3] The liability of carriers of passengers is not so extensive as that of carriers of goods; they do not warrant the safety of the passengers at all events, but are liable to this extent, that they and their agents possess competent skill, and that they will, so far as human care and foresight will go, use the utmost care and diligence of very cautious persons.[4] Especially in the case of railways, the personal safety of passengers should not be left to chance, or the negligence of careless agents; and any negligence may well deserve to be called gross.[5] Where a railway company has running powers over another company's line, it is liable to passengers for injury from collision, though it was owing to the negligence of the servants of the other company.[6]

136. Common carriers of passengers are bound to take all who are ready to pay, and for whom they have room; while a passenger is bound to submit to reasonable rules for the safety and convenience of all, and he may be refused admittance if he refuses to obey such, or is guilty of gross and vulgar habits, or makes a disturbance, or is a dissolute or suspicious character.[7]

Duty to take passengers.

137. Next the vehicles must be road-worthy. If an

1 Austin *v.* G. W. Ry. Co. L. R. 5 Q. B. 442.

2 Moffatt *v.* Bateman, L. R. 3 P. C. 115.

3 Hall *v.* N. E. Ry. Co. L. R. 10 Q. B. 437.

4 Christie *v.* Griggs, 2 Camp. 80.

5 Story on Bailm. 601.

6 Thomas *v.* R. Ry. Co. L. R. 5 Q. B. 226, and 6 Q. B. 266.

7 Story on Bailm. 591, 591a.

Competency of vehicles, &c.

accident happens from any defect, although out of sight and not discoverable upon ordinary examination, yet if it might be discovered by a more minute examination and more exact diligence, the carrier will be liable;[1] but not if the defect was altogether hidden, as a small flaw in the interior of an iron axle tree.[2] The obligation of such a carrier is to use due care, skill and foresight to carry the passenger safely, but is not a warranty that the carriage is in all respects perfect, that is free from all defects likely to cause peril, though such that no skill, care or foresight could have detected their existence.[3] So, the driver must be careful, of reasonable skill and good habits, and acquainted with the road; the horses steady and not vicious, and the harness of sufficient strength and properly made, and there must be also lights at night.[4] The carriage must not be overloaded with passengers or luggage.[5] Negligence or incaution in the driver, or his omitting to give due warning in a particular passage to passengers, will involve liability for damage resulting therefrom.[6] If from any neglect there was real danger, and the passenger, to escape, jumps off, and is thereby hurt, the carrier is still liable.[7]

Collision by joint negligence of drivers.

138. Where two carriages come into collision caused by negligent driving on both sides, and a passenger is hurt, it has been held that he is identified with his own driver, and can

1 Sharp *v.* Grey, 9 Bing. 457.

2 Story on Bailm. 592, and American case of Ingalls *v.* Bills, 9 Metc. 1; Richardson *v.* G. E. Ry. Co. L. R. 10 C. P. 494, and 1 C. P. D. 343.

3 Readhead *v.* Midland Ry. Co. L. R. 4 Q. B. 379.

4 Crofts *v.* Waterhouse, 3 Bing. 321.

5 Long *v.* Horne, 1 C. & P. 612.

6 Dudley *v.* Smith, 1 Camp. 167.

7 Jones *v.* Boyee, 1 Stark. 493.

recover damages only from him or his principal. But it seems highly unreasonable to apply the doctrine of contributory negligence to such a case, and there is no valid reason why both the wrongdoers should not be considered liable to a person free from all blame, not answerable for the acts of either of them, and whom they have injured.[1] Where two companies by an arrangement between them use stations or the same line in common, then *firstly*, if a passenger of A is hurt by the negligence of B, the latter is clearly liable to him; *secondly*, A is liable to its passengers, though the defect was in B's line or the negligence that of B's servants, where the default related to the management of the line or train, for B's line and servants are so far really those of A; but *thirdly*, A is not liable where the default of B was as extraneous an act of negligence as if it had been the act of a trespasser or third party.[2]

139. In case of accident to a carriage drawn by horses, &c., some evidence of negligence must be given; the mere fact of the accident is not enough; though, generally in such cases, the same evidence which proves the damage done, shows also circumstances from which strong presumptions of negligence arise, and which cast on the defendant, the burden of disproving it.[3] The overcrowding of the carriages and the insufficiency of the officials to control a crowd may be evidence of negligence.[4] When there has been an accident on a railway by

Proof of negligence.

1 Note to Ashby *v.* White, 1 Sm. L. C. 220; Armstrong *v.* L. and Y. Ry. Co. L. R. 10. Exch. 47.

2 Terbutt *v.* B. and E. Ry. Co. L. R. 6 Q. B. 73; Thomas *v.* Rhymney Ry. Co. L. R. 6 Q. B. 266 compared with Wright *v.* Midl. Ry. Co. L. R. 8 Exch. 137.

3 Story on Bailm. 601a; Moffatt *v.* Bateman, L. R. 3 P. C. 115; Simson *v.* L. G. O. Co. L. R. 8 C. P. 390, and see § 124 for cases of negligence in drawing up at stations.

4 Jackson *v.* Metr. Ry. Co. L. R. 10 C. P. 49.

running off the line, it has been held that it lies on the company to disprove the negligence, since both rail and carriage were under their control.[1] The fact of a railway having given way, is *primâ facie* evidence of its insufficiency; and a railway should be so constructed as to resist all violence that may be expected to occur, though rarely.[2] But the general rule is that there ought to be affirmative evidence of negligence;[3] though, in some cases, the fact of the accident itself may, from its nature be *primâ facie* evidence of negligence; as where goods fall out of a warehouse into a public street;[4] or where no reasonable explanation of the damage can be given except the negligence of the defendants.[5] But a railway company though bound to use reasonable care to prevent accidents from cattle straying on the line, does not warrant the sufficiency of the fences, and there should be some evidence of neglect.[6]

Defence of mere accident.

140. But proof of mere accident is a good defence, as that it was caused by foggy weather, the removal of accustomed landmarks,[7] or by the horses being accidentally frightened and becoming unmanageable,[8] or by some unforeseen obstruction, or by the

1 Carpue *v.* L. and B. Ry. Co. 5 Q. B. 751, and see infra § 200.

2 Canada, &c. Ry. Co. *v.* Fawcett, 9 Jur. N. S. 339.

3 Hammond *v.* White, 8 Jur. N. S. 796; Welfare *v.* L. and B. Ry. Co. L. R. 4 Q. B. 693, and see Daniel *v.* Met. Ry. Co. L. R. 3 C. P. 591, and Fordham *v.* L. and B. Ry. Co. id. 4 C. P. 619 for examples of what is such evidence.

4 Byrne *v.* Boadle, 10 Jur. N. S. 1107; Scott *v.* London D. Co. 11 Jur. N. S. 204; Blamires *v.* L. and Y. Ry. Co. L. R. 8 Exch. 283.

5 Czech *v.* Gen. S. N. Co. L. R. 3 C. P. 14; Kearney *v.* L. B. and S. C. Ry. Co. id. 5 Q. B. 411, and 6 Q. B. 759.

6 Buxton *v.* N. E. Ry. Co. L. R. 3 Q. B. 549.

7 Crofts *v.* Waterhouse, 3 Bing. 319.

8 Holmes *v.* Mather, L. R. 10 Exch. 261.

inclemency of the weather rendering the driver incapable of doing his duty.[1]

141. An instance of tort arising out of contract, is where there has been a breach of the private duty owing by the master to the servant consequent upon the employment. Generally, it is said that the servant engages to run the ordinary risk of the employment, and that perils arising from the negligence of fellow-servants engaged in a common service, are included in this risk; for that he might decline the service, and the risk is included in his compensation.[2] As to the limits of this rule there has not been a uniformity of opinion.

LIABILITY OF A MASTER TO HIS SERVANT.

142. Every master is bound to take all reasonable precautions for the safety of his servants. If hidden and secret dangers exist upon his premises, known to him and unknown to his workmen, it is his duty to disclose them to the latter that they may take precautions.[3] He ought not to send his servant with a light into a godown full of gunpowder without telling him what is in the godown. So, a railway company ought not to expose the workmen engaged on their line, or at their stations, to unexpected and unforeseen dangers, which they have no means of guarding against.[4] But the master is not liable if the servant knew of the dangerous state of the premises, or the dangerous nature of the machinery in use.[5]

Reasonable diligence is exacted from master.

1 Story on Bailm. 602.

2 Priestley *v.* Fowler. 3 M. and W. 1; Lovell *v.* Howell, 1 C. P. D. 167.

3 Williams *v.* Clough, 27 L. J. 325 Exch.

4 Vose *v.* L. and Y. Ry. Co. 27 L. J. 249 Exch.

5 Seymour *v.* Maddox, 16 Q. B. 326.

143. So, if a master employs ignorant, inexperienced men in dangerous employments, and exposes them improperly to risks, of which he is cognizant, and which are not known to the ignorant workmen, he will be liable for the consequences of his misconduct.[1] So, if he frames rules, carelessly or improperly for the management of the business, and these lead to dangers which, by proper rules, might have been avoided, he is liable.[2] But if a rule framed to secure safety, is habitually violated to the knowledge of the workman himself, he cannot recover damages from his master on the ground of the non-observance of the rule.[3] It is also the master's duty to be careful that his workman is not induced to work under the notion that the machinery, tackle, scaffolding, or rope with which he works, is secure, when the master knows, or has reasonable ground for believing, that it is unsafe and dangerous.[4]

Employment of ignorant servant.

Improper rules.

Defective apparatus.

144. Where dangerous machinery is employed, and the servant is, or professes to be, acquainted with its use, and requisite care is taken to guard against accident, the master is not liable.[5] But where machinery was duly guarded when the servant entered into the service, but afterwards became dangerous, and the servant complained, but the master promised to have it made safe, he was held liable for subsequent damage to the servant.[6] So if there is a neglect by the master of the sta-

Dangerous machinery.

1 Mellor v. Shaw, 7 Jur. N.S. 845.
2 Vose v. L. and Y. Ry. Co. 27 L. J. 249 Exch.
3 Caswell v. Worth, 5 E. and B. 849; Senior v. Ward, 28 L. J. 139 Q. B.
4 Roberts v. Smith, 26 L. J. 319 Exch.
5 Dynen v. Leach, 26 L. J. 221 Exch.
6 Clarke v. Holmes, 7 Jur. N. S. 397; 8 Jur. N. S. 992.

tutory duty to fence machinery, and no negligence on the part of the servant, the master will be liable.[1]

145. Where the master himself interferes in the conduct of the work, and knowingly or negligently allows defective materials to be employed, as in the construction of a scaffold, he is liable to his servant for damage resulting therefrom.[2] If one partner acts as a workman, or otherwise interferes, and by negligence causes damage to his workmen, all his partners are also equally liable.[3] In cases of this nature, negligence may be described as consisting in the omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do; in either case causing, unintentionally, mischief to a third party.

Personal interference by master.

—by one of several partners.

146. In such a case as where A contracts with B to be supplied with sound road-worthy coaches, and to keep them in repair, and A hires C as driver for one of the coaches, which from a defect breaks down and maims C, he cannot sue his master A, for it was an ordinary risk; and he will be without remedy against B also, though B was guilty of negligence, unless there was fraud on the part of B, and a knowledge of the defect and of the intention that C should use the coach.[4]

Case in which a servant may be without remedy.

147. Generally, the liability to a guest is the same as to

1 Britton *v.* G. W. Cotton Co. L. R. 7 Exch. 130.

2 Senior *v.* Ward, 28 L. J. 139 Q. B.; Roberts *v.* Smith, 26 L. J. 319 Exch.; Ind. Contr. Act, s. 225.

3 Ashworth *v.* Stanwix, 7 Jur. N. S. 467.

4 Winterbottom *v.* Wright, 10 M. & W. 109.

These rules not limited to servants.

a servant; the master of the house is bound to give notice of unsuspected dangers on the premises which are known to him.[1] And, generally, the rules as to the liability of the master to the servant are applicable to any other establishment, as the members of any family. The foundation of the rules, and the test of the relation of master and servant, is, not the payment of wages, but the exercise of control.

Reason of the rules.

Damage by negligence of a fellow-servant.

148. Where the damage is caused by the negligence of a fellow-servant, there is always a remedy against the wrongdoer, but when the master may also be made liable, has been much discussed. To free him from liability one essential is, that the two servants should, at the time, have been engaged in a common service. It is not enough that they were servants of the same master, they must have been employed in the same work; if a gentleman's coachman drives over his gardener, the master would be just as liable as if the coachman had driven over a stranger.[2] There is no general definition of what is a common service; each case will depend on its own facts; but servants on two trains on the same line are in a common service;[3] and so are servants on a train and those working the line, as pointsmen; and therefore the company could not be liable to such servants.[4] And generally where the employment of a servant is such as to bring him into contact with the traffic on the line, the risk of injury from the carelessness of those managing the traffic

1 Southcote v. Stanley, 1 H. & N. 247.

2 Bartonshill Co. v. Reid, 3 Macq. 294; Hutchinson v. York Ry. Co. 5 Exch. 343.

3 Hutchinson v. York Ry. Co. supra.

4 Waller v. S. E. Ry. Co. 9 Jur. N. S. 501.

is one naturally incident to his employment.[1] But where one railway company uses the station of another company, the servants of the two companies are not at the station fellow-servants.[2] A pilot whose employment is compulsory is not a fellow-servant with the seamen, and may recover from the shipowner when injured by their negligence.[3] Another essential is that the master should not have been guilty of any want of care in selecting his servant, that is, that the fellow-servant should not have been an incompetent or improper person.[4]

Different limits given to the rule.

149. In England it has been held, that, where the fellow-servant was a foreman or superintendent, the master is not liable, unless the foreman, &c. was an incompetent person; for the rule is not affected by the fellow-servant being a superior whose orders the plaintiff was bound to obey, a foreman being still a fellow-servant.[5] In Scotland it has been said that such a rule is not consistent with justice or reason. There the master's first duty (it is said) is the safety of his men; the ruder the apparatus he uses, the more care he is bound to show. He ought to be liable for the negligence of those who are intrusted by him to do acts which he cannot do himself, and particularly so as to the person whom he intrusts with the direction and control over any of his workmen, and who represents him in such a matter.[6] But it has recently been

1 Morgan *v.* V. N. Ry. Co. L. R. 1 Q. B. 149; Lovegrove *v.* L. and B. Ry. Co. 10 Jur. N. S. 879; Tunney *v.* M. Ry. Co. L. R. 1 C. P. 291; Lovell *v.* Howell, 1 C. P. D. 161.

2 Warburton *v.* G. W. Ry. Co. L. R. 2 Exch. 30.

3 Smith *v.* Steele, L. R. 10 Q. B. 125.

4 Wigmore *v.* Jay, 5 Exch. 354; Tarrant *v.* Webb, 18 C. B. 797.

5 Feltham *v.* England, L. R. 2 Q. B. 33; Howells *v.* Landore S. Co. L. R. 10 Q. B. 62; Allen *v.* New Gas Co. 1 Exch. D. 251.

6 Dixon *v.* Ranken, cited in Story on Agency, § 453 g.; but see Erskine's Principles, 454, and Bartonshill Co. *v.* Reid, supra.

held that this difference in the law does not exist, and that the rule there is the same as in England.[1] In America the master has been made liable for the negligence of a superior fellow-servant under whose control the servant injured was placed, whose orders he was bound to obey, and over whose acts he had no power so as to prevent the evil consequences resulting to himself.[2]

Liability to a volunteer.

150. If a person comes forward as a volunteer, and offers to assist servants engaged in a difficult or dangerous work, and he gets injured by the negligence of one of the servants, his relation to, and the liability of the master, are the same as if he had been a hired servant; he can impose no greater responsibility upon the master, than that to which he was subject in respect of persons actually employed by him.[3] But though parties combine for a common purpose, they are not, therefore, to be always regarded either as volunteers the one to the other, or as engaged in a common service.

Test of a common service of being a volunteer.

If a merchant sells goods to A, and in delivering the goods to the servant of A, at his house or elsewhere, the servant of the merchant, by negligence, injures the servant of A, he may have an action against the merchant, for the servants were employed in different interests, had different masters and different liabilities. So, where B bought bales of cotton which were in a warehouse, and hired C to weigh and lower them, and also contracted with D to cart them away, and E, the servant of D was hurt by the negligence of C in lowering a bale, B was held

1 Wilson *v*, Merry, L. R. 1 H. L. Sc. 326.

2 Story on Agency, § 453 d. to 453 h. where the subject is fully discussed.

3 Degg *v*. Midland Ry. Co. 1 H. & N. 773; 3 Jur. N. S. 395; Potter *v*. Faulkner, 8 Jur. N. S. 259.

liable to E.[1] So a person assisting servants by the leave or invitation of the master is not a mere volunteer, and the master will be liable to him for injury by their negligence.[2]

TORT TO PERSON BY SALE OF NOXIOUS FOOD.

151. A regular butcher, or dealer in provisions, has been said to be bound by law to know the quality of the article he sells, and to be civilly responsible, if any special damage results to any of his customers by using such noxious food.[3] But the foundation of the action is the deceit; and a wholesale dealer, selling specific articles on inspection to a retail dealer, does not warrant that the provisions are fit for human food;[4] and, perhaps, in sales to others, a warranty is implied only as with other dealers in goods, so that when an order is sent to them to execute, they are presumed to undertake to supply a good and merchantable article.[5] But an ordinary individual, not being a regular dealer, will not be civilly liable, unless it be shown that he sold the food as sound and wholesome, knowing it to be otherwise.[6] By the Indian Contract Act, s. 111, on the sale of provisions there is an implied warranty that they are sound; but this does not induce a liability other for a mere breach of contract. The adulteration of food, and the sale of noxious food, are made offences by ss. 272 and 273 of the Penal Code.

152. So, in some other cases, there may be a liability, by

1 Abraham v. Reynolds, 6 Jur. N. S. 53.

2 Wright v. L. and N. W. Ry. Co. L. R. 10 Q. B. 298, and 1 Q. B. D. 252.

3 Burnby v. Bollett, 16 M. & W. 644.

4 Emmerton v. Matthews, 8 Jur. N. S. 61.

5 Bigge v. Parkinson, 8 Jur. N. S. 1014; Chitty on Contracts (7th ed.) 409.

6 Broom's Com. 719.

TORT TO PERSON BY REASON OF DECEIT.

reason of deceit, even where there is no privity of contract; for if a falsehood be knowingly told, with an intention that another person shall believe it to be true, and act upon it, and that person has acted upon it, and suffered damage, the other party will be liable to him civilly.[1] Thus, if A fraudulently misrepresents a dangerous gun to be a safe one, and manufactured by a particular maker, and sells it to B, knowing that it is intended to be used by B and B's sons, and the gun bursts and hurts one of B's sons, he may have an action against A.[2] But the ground of the action is the fraud and knowledge coupled with the consequent damage. If a friend of B had used the gun and been hurt, A would not be liable to him.[3] What representations amount to fraud inducing civil liability, will be noticed under actions of deceit, which chiefly involve torts to property.

TORT TO BAILEE OF A CHATTEL.

153. Even the gratuitous lender of a chattel is bound to give notice to the borrower of the defects in the thing lent; and if he does not, and conceals them, and damage occurs to the borrower thereby, the lender is responsible. Thus, if one delivers to another, without notice, an instrument in its nature dangerous, as a loaded gun; or if a dangerously vicious horse is let or lent without notice of his faults, the letter or lender may become liable for personal damage resulting therefrom.[4] So, if one delivers such dangerous goods as nitric acid to a carrier or cooly, without giving notice of their nature, and the vessel

1 Pasley *v.* Freeman, 2 Sm. L. C. 62.

2 Langridge *v.* Levy, 2 M. and W. 519; George *v.* Skivington, L. R. 5 Exch. 1.

3 Longmeid *v.* Holliday, 6 Exch. 761; Collis *v.* Selden, L. R. 3 C. P. 495.

4 Story on Bailm. 275; Ind. Contr. Act, s. 150.

bursts and the cooly is hurt, the other is liable.[1] But this liability does not extend beyond the hirer or borrower, or those for whose intended use the horse or thing was knowingly let or lent. If the borrower asks a stranger to assist in the use of the thing, and, from some unsuspected defect, the latter is hurt in the use of it, the lender is not liable to him.[2]

Limit of the liability.

1 Farrant *v.* Barnes, 8 Jur. N. S. 868.

2 Blakemore *v.* Bristol, &c. Ry. Co. 8 E. and B. 1035; 27 L. J. 167 Q. B.

CHAPTER III.

TORTS TO PROPERTY.

154. Torts to property, and the incorporeal rights connected therewith, may be conveniently considered under two sections, namely, I, where the object is real or immoveable property, and II, where it is personal or moveable property. In both sections the classification of the instances of such torts according to their nature, will, as far as possible, be maintained.

Division of subject.

SECTION I.

TORTS TO REAL PROPERTY.

155. The first instance of a tort to real property by the invasion of a general right, is where there is a wrongful detention, or withholding of land, &c., from its lawful owner, by possession and occupancy adverse to his rights. The person having a right of entry into the land may have an action to recover its possession. But if A claims land of which B is in possession, B is, in law, to be considered as the owner of the land, until the contrary be proved.[1] Hence A must recover by the strength of his own title, and not by the weakness of that of B.[2] But reasonable presumption will be admitted in favor of a title; thus, if A claims as heir at law of C, it will be sufficient for him to prove that C was in possession, and that he (A) is his heir for it shall be intended *primâ facie* that C was seized in fee until the contrary appear.[3]

Adverse occupancy.

1 Crease *v.* Barrett, 1 C. M. and R. 931.

2 Martin *v.* Strachan, 5 T. R. 107(n.)

3 Broom's Com. 769; Asher *v.* Whitlock, L. R. 1 Q. B. 1.

156. As the claimant must show title in himself, it will be a good defence, if the occupant can answer the case by showing the real title to be in another.[1] But should A succeed in his action, and should it happen that B, or any other person, afterwards becomes clothed with a better title than A, a second action may be brought, and A may be ejected from the land, for a person may have a title to the possession of land at one time and not at another.[2] But, of course, the judgment does operate as an estoppel to B, and those claiming as privies under him, suing in the same capacity, and under the same title as was in issue in the former suit.[3]

157. Where it is a landlord who sues to recover possession from his tenant, he will not have to prove his title; for the tenant is not allowed (unless the defect of title appear on the lease itself)[4] to dispute his landlord's original title at the time of the demise,[5] though he may show that such title subsequently expired.[6] An under-tenant is in the same position as the original tenant; and hence if he came in after the title expired, but whilst the first tenancy continued, he is estopped from denying the title of the landlord at the time of the commencement of his own tenancy.[7] But if A occupies as his own the land of B, and afterwards becomes tenant to B of an adjacent plot, his adverse occupancy of the first plot is not interrupted.[8] One who enters by leave and then retains possession is in the position of a

Where there is the relation of landlord and tenant.

1 Doe v. Barnard, 13 Q. B. 945; 2 Selw. N. P. 755.

2 Broom's Com. 767.

3 See note to D. of Kingston's Case, 2 Sm. L. C. 619 (4th ed.)

4 Gouldsworth v. Knight, 11 M. and W. 337; Greenaway v. Hart, 14 C. B. 340.

5 Delaney v. Fox, 26 L. J. 248 C. P.; Doe v. Austin, 9 Bing. 45.

6 Downs v. Cooper, 2 Q. B. 256; see notes to Doe v. Oliver, 2 Sm. L. C. 653.

7 L. and N. W. Ry. Co. v. West, L. R. 2 C. P. 553.

8 Dixon v. Baty, 1 Exch. 259.

tenant;[1] and so, if a person obtains possession of premises by an arrangement with the tenant, whether collusive or otherwise.[2] An encroachment by a tenant on the adjoining land of the lord or of another is presumed to be for the benefit of the landlord; and it is not necessary that the land should actually adjoin if the proximity is such that it may be presumed that his position as tenant enabled him to encroach.[3] Generally, then, the landlord will merely be required to prove the circumstances under which the defendant, or the party under whom he claims, was admitted into possession, and how such right to possession has ceased, as by efflux of time, or by some act working a forfeiture of the lease, as by reason of some condition in the lease, or of any act of the tenant disaffirming the landlord's title.[4]

158. But though the wrongful detention of land against one who has the title thereto, and a right to the immediate possession thereof, is thus a tort by the invasion of his right, there are a great variety of characters and titles under which one may claim to eject another and numerous defences thereto, so that these cases cannot be adequately treated in a work on torts generally, but deserve, as they usually receive, separate and special consideration.

TRESPASS UPON REAL PROPERTY.

159. The next tort to be considered is an invasion, not of the right of title or property, but of the right of possession. This may be called trespass upon real property, though trespass, in the larger sense of the word, takes in every injurious act not amounting to treason or felony.[5] Every trespass upon land is an

1 Doe *v.* Baytup, 3 A. & E. 188.
2 Doe *v.* Mills, 2 A. & E. 17.
3 Lisburne *v.* Davies, L. R. 1 C. P. 259; Whitmore *v.* Humphries, L. R. 7 C. P. 1.
4 Broom's Com. 769, 770.
5 3 Bl. Com. 208; Tomlin's Law Dict.

injury, although it consists merely in the act of walking over it, and no damage is done to the soil or grass.[1] So, every invasion of the possession of the occupier is an injury to the property, as, if a man is unlawfully turned out of his dwelling house, that amounts to an injury to the dwelling house, and entitles the occupier to recover substantial damages, though no actual pecuniary damage can be proved.[2] For every violation of such right at least nominal damages must be given; it is no answer that the unauthorized entry was an act positively beneficial to the plaintiff.[3]

160. Trespass (in the limited sense of the word) is where the injury is committed with force, actual or implied, and is the immediate result thereof; and the right of action is founded upon actual possession by the plaintiff, by himself, or by his servant, or agent.[4] Hence the tenant in possession is the person who is aggrieved by an entry upon land; though if special damage of a permanent nature ensues, the reversioner may also have an action on that account.[5] Hence it is not a trespass if one tenant in common cuts and carries away in due season the whole produce of the common property, but the remedy of the other tenant in common is a suit for an account.[6] Hence also before entry and actual possession, a person cannot maintain trespass, though he had the freehold in law, as an heir; but upon entry the possession relates back to the date of the accrual of the right, and he may have an action for the injury in the interval.[7] There is this dis-

Who may sue for trespass.

1 Ashby *v.* White, 1 Sm. L. C. 185; Entick *v.* Carrington, 19 St. Tr. 1066.
2 Meriton *v.* Coombes, 9 C. B. 972.
3 Broom's Com. 779.
4 3 Bl. Com. 209, 210; Bertie *v.* Beaumont, 16 East, 33.
5 Baxter *v.* Taylor, 4 B. & Ald. 72; Simpson *v.* Salvage, 26 L. J. 50 C. P.
6 Jacobs *v.* Seward, L. R. 4 C. P. 328.
7 Barnett *v.* Guildford, 11 Exch. 19; 3 Bl. Com. 210.

tinction between personal and real property, that the general property in the former draws to it, in construction of law, the possession for all civil purposes, though there may be no actual possession.[1]

Possession what.

161. Hence proof by the plaintiff of possession in himself and of a *primâ facie* tortious entry by the defendant, will entitle him to a verdict.[2] Further, the possession must be exclusive;[3] but the right or interest need not extend to the land itself, or to the exclusive use of it; thus, it may be an exclusive right to a growing crop on the land, or an exclusive right to cut turf on the land which may have been invaded.[4] Properly, all possession is always exclusive. Where any thing is possessed in common by several, it is only in appearance that the same thing is the subject of their possession, for each possesses a part only, and not the remaining parts; and it makes no difference, juridically considered, that there is, not a real, but only an imaginary, separation of these parts from one another.[5] As soon as a person entitled to the possession of land peaceably enters upon it in the assertion of that title, the law immediately vests the actual possession in him.[6] Hence, if two at the same time enter a field asserting a right to possess, the actual possession is in him alone who has the title, the law making the possession in such case to follow the title.[7]

1 Com. Dig. Tres. B. 4 Thomas *v.* Phillips, 7 C. & P. 573.

2 Jones *v.* Chapman, 2 Exch. 816; Stanford *v.* Hurlstone, L. R. 9 Ch. 116.

3 2 Selw. N. P. 1296; Revett *v.* Brown, 5 Bing. 7.

4 Crosby *v.* Wadsworth, 6 East, 602; Wilson *v.* Mackreth, 3 Bur. 1824.

5 Savigny on Poss. 113 (Perry's trans.)

6 Butcher *v.* Butcher, 7 B. and C. 399.

7 *per* Maule, J. in Jones *v.* Chapman, 2 Exch. 821; Lows *v.* Telford, 1 Ap. C. 426.

162. What constitutes the acquisition and loss of possession is a question that has led to much subtle discussion. But, briefly, possession consists in a physical act accompanied by an act of the will.[1] The first is not necessarily connected with any bodily contact with the whole or any part of the subject, but it implies the physical power of dealing with the subject immediately, and of excluding any foreign agency over it.[2] The act of the will must contemplate a dealing with the subject as one's own property, and not on behalf of another.[3] The continuance of the possession depends on the union of these two essentials; and hence, if either one or the other, or both together, cease, the possession is lost.[4] The possession of a moveable is lost, when another makes himself master of it, either secretly or by force; then the exclusion is complete.[5] But as to land, it is clear that although by mere absence the power of dealing with it at will becomes a more remote relation, it is not at all put an end to by it.[6] There must be something in addition to absence; hence, he who occupies land in the absence of the possessor, is not considered to have ousted him, till the possessor has had notice, and is either unable to enter upon his possession, or voluntarily refrains from so doing.[7]

Acquisition and loss of possession.

163. Hence, a mere trespasser cannot, by the very act of trespass, immediately, and without acquiescence on the part of the land owner, become possessed of the land, and he may consequently be expelled by main force; but if the land

1 Savigny on Poss. 72.
2 Id. 147.
3 Id. 73.
4 Id. 171, 246, 267.
5 Id. 254.
6 Id. 261.
7 Id. 262, 3; on possession see also Jencken on Modern Roman Law, 100 to 108.

owner sleeps upon his rights, the other will gain possession, and cannot be forcibly ejected.[1] So, a mere intruder who has run up a hut, has no right to the hut or to the possession of it, and the landlord may enter and pull it down, and remove the materials.[2] In England, if one is wrongfully in possession, and the rightful owner enters, he is no trespasser, but thereby acquires possession and may bring trespass against any who continue upon the land.[3] So that he who has the freehold and the right of entry, may justify a forcible entry, though he may be liable to an indictment for the public offence.[4] This rule grew up in spite of repeated statutes against forcible entries, but was originally merely a device to substitute for the old forms of real actions, the easier form of an action for trespass in which the title to land might be tried.[5] The more equitable rule of the Roman law did not allow a man thus to take the law into his own hands, and to assume the advantages of possession.[6] The Courts in India should adopt the same rule. By Act 14 of 1859, sec. 15, if one in possession of immoveable property is dispossessed otherwise than by course of law, he may, within six months, sue to recover possession without reference to any title set up by another, which is left to be determined in a separate action.

Evidence of possession.

164. If a landowner allows a relative, dependent, or friend, to occupy rent-free a cottage and land upon his estate, he does not thereby necessarily part with the possession of it, but may continue

1 Browne *v.* Dawson, 12 A. and E. 624.
2 Davison *v.* Wilson, 11 Q. B. 890.
3 Butcher *v.* Butcher, 7 B. and C. 399; Taylor *v.* Cole, 1 Sm. L. C. 95.
4 Harvey *v.* Bridges, 14 M. and W. 442. For the conflicting decisions on the right of a landlord to forcibly eject a tenant at the expiration of his term, see 2 Selw. N. P. 1300.
5 3 Reeves's Hist. 397, 202, 229, 289; 3 Bl. Com. 214.
6 Phillimore on Jur. 219; Norton on Evid. § 699 (n.)

to exercise acts of ownership over the land so occupied.[1] And generally as against third persons, the possession of the tenant is the possession of the owner.[2] So, if he suffers his servant, or workman employed upon his estate, to live in a cottage thereon rent-free, the possession of the servant is the possession of the master, and no title can be gained by such occupation however long it may be continued.[3] Very slight evidence of possession is sufficient to establish a *primâ facie* title to sue for an injury to reality, such as pasturing cattle, &c., thereon. But proof of possession of the key of a building is no proof of the possession of the building itself.[4] So, on proof of title to the land in the plaintiff, possession will be presumed to follow the property when there is no evidence to the contrary, and no actual possession in another.[5]

165. A general principle applicable to trespasses, is, that one whose original entry was lawful, may, by reason of some subsequent abuse, be reckoned as a trespasser from the beginning.[6] Where one enters under an authority *in law*, a subsequent abuse of such authority will make him a trespasser from the beginning; thus, if one enters a shop or tavern, the entry is lawful, but if he does damage or insists on remaining there all night against the will of the landlord, he is accounted a trespasser from the first; for in such a case the law holds that the wrongdoer entered with the intention to do the wrongful act of which he was subsequently guilty.[7]

Trespass *ab initio.*

1 Mayhew *v.* Sattle, 4 E. & B. 347.
2 Bushby *v.* Dixon, 3 B. & C. 298; 2 Selw. N. P. 747.
3 Turner *v.* Doe, 9 M. & W. 645; White *v.* Bailey, 7 Jur. N. S. 948.
4 Revett *v.* Brown, 5 Bing. 7.
5 Rex *v.* Mayor of London, 4 T. R. 26.
6 Six Carpenters' Case, 1 Sm. L. C. 111.
7 Id. 112.

So, if a sheriff or other officer, enters upon premises to make a levy under a writ, and he remains there more than a reasonable time for the execution of the writ, he is a trespasser as much as if he had entered without any authority.[1] But it seems that there is a distinction between cases in which what was done in excess of the authority *may* have been contemplated at the time of the original act, and those in which it could not possibly have been so.[2] So, a man cannot be made a trespasser by relation where the act complained of was lawful at the time when done.[3] Further, a mere non-feasance or omission, as a refusal to pay for goods, or liquor supplied, does not render one a trespasser from the beginning, for the remedy is then an action for the debt.[4] Where one enters under an authority *in fact*, as under a license given by the party, and he abuses it, then he must be punished for his abuse, but he shall not be a trespasser from the beginning.[5] Where the law gives the authority and it is abused, there may reasonably be greater strictness than where the authority was voluntarily given, for it was the man's own folly to place confidence in one not fit to be trusted.[6]

166. Another doctrine applicable indeed to torts generally, but practically most often applied to trespasses upon property, is that of the ratification of a wrongful act by a party for whose use and benefit the act was done.[7] But to make the subsequent ratification equivalent to a precedent command, the act of trespass must have been committed in the name, and avow-

Ratification of a tort.

1 Reid *v.* Harrison, 2 W. Bl. 1218.
2 Smith *v.* Eggington, 7 A. & E. 161; Magnay *v.* Burt, 5 Q. B. 381.
3 Broom's Com. 788; 1 Hilliard, 123.
4 1 Sm. L. C. 113.
5 Id. 112.
6 Bac. Abr. Trespass.
7 See notes to Armory *v.* Delamirie, 1 Sm. L. C. 259.

edly on behalf, and for the benefit, of the party subsequently ratifying it.[1] Further, it must be shown that he was in a situation to have originally commanded the act at the time it was done,[2] and that the act was ratified and adopted by him with full knowledge of its being a trespass, or of its being tortious, or that, in ratifying and taking the benefit of the act, he meant to take upon himself, without inquiry, the risk of any irregularity which might have been committed, and adopt the transaction, right or wrong.[3] Offers to compromise are of themselves no evidence of ratification. On the other hand, if, at the time the act, otherwise wrongful, was done, the party ratifying it might himself have lawfully done it, he may thus take advantage of the act: thus, if A assuming to be the bailiff or agent of B, but really without authority, distrains for rent when B might lawfully have done so, B may ratify the act and take advantage of it, and the ratification will make A bailiff at the time.[4] One of several partners has no authority to use the name of the firm to order a wrongful act, and therefore his co-partners are not liable for such tort; but they may be if they afterwards adopt and take the benefit of the act.[5] But an act which is itself a criminal offence is not capable of ratification; thus a man cannot ratify a forgery of his own signature.[6]

Trespass where surface and subsoil are held separately,

167. The surface and subsoil of land may be held separately or constitute separate freeholds. But by a general demise, the lessee has possession of both the surface and the minerals, but neither lessee nor lessor can work the

1 Eastern C. Ry. Co. *v.* Broom, 6 Exch. 314; Wilson *v.* Tummon, 6 M. and Gr. 236.

2 1 Sm. L. C. 259; Bird *v.* Brown, 4 Exch. 786, *s. q.* this case.

3 Freeman *v.* Rosher, 13 Q. B. 780.

4 1 Sm. L. C. 260.

5 Petrie *v.* Lamont, Car. and M. 96.

6 Brook *v.* Hook, L. R. 6 Exch. 100.

minerals without the leave of the other, though if a third person, from adjoining land, makes lateral excavations and removes the minerals, the lessee may sue for the injury to his possessory interest, and the lessor for the damage to his reversion.[1] Where the surface and subsoil are held separately, the owner of the one or the other respectively, can alone sue for a trespass thereon.

Property in sea shore.

168. The sea shore between high and low water mark is *primâ facie* the property of the State, and the limit of the sea shore is the line of ordinary high tides;[2] uninclosed waste land beyond and abutting on such line, belongs *primā facie* to the owner of the adjoining property.[3] So, where the property in the soil is in a subject, and he dedicates part of his land to the use of the public as a high way, he does not thereby lose his property in the soil of the road, but may have trespass against one who deposits rubbish upon it, or builds a bridge over it.[4] So, where a road runs between the land of two owners, the ordinary presumption is, that each is the owner of the soil to the middle of the road; but it may be shown to be otherwise.[5] There is a similar presumption as to the property in the soil of a river (not being a navigable river) flowing between the lands of two proprietors; if it be a navigable river, the soil of the bed is presumed to belong to the Crown, at least as far as the flow of the tide.[6] Hence the riparian proprietor

—in high roads.

—in soil of rivers.

1 Keyse *v.* Powell, 2 E. and B. 132.

2 Attorney-G. *v.* Chambers, 4 DeG. M. & G. 206.

3 Lowe *v.* Govett, 3 B. & Ad. 869.

4 Dovaston *v.* Payne, 2 Sm. L. C. 113; Every *v.* Smith, 26 L. J. Exch. 345.

5 Cooke *v.* Green, 11 Price, 736.

6 Wright *v.* Howard, 1 S. & S. 190; 2 Bl. Com. 36; 3 Kent's Com. 529, 534, 545, 550.

(whose property terminates at high water mark) has not any rights over the river or shore beyond the rights of the rest of the public, and hence the obstructing or depriving him of access to his wharf or land is not a violation of his private rights; but his right of action depends on his suffering a particular damage from a public nuisance.[1]

—in boundary walls and fences.

169. The property in a boundary wall belongs to him on whose property it is built. If it stands on the land of both neighbours, they are generally, but not necessarily, tenants-in-common of the wall,[2] and for an ouster one may have an action against the other, as where the wall is destroyed, or it is otherwise substantially changed, as by placing a building against it, and making an improper addition to its height.[3] A boundary hedge may, in like manner, belong to two in common, but the exercise of acts of ownership may show the property to be in one only. If there are a hedge and a ditch, both belong to him on whose side of the ditch the hedge is, as the bank of the hedge is presumed to have been made with the earth of the ditch.[4] The property in trees in a hedge follows the property in the hedge; but he whose property is overshadowed by the branches of his neighbour's trees, may compel the latter to cut off such branches; for an action will lie against him, if the boughs of his trees are allowed to grow so as to overhang the adjoining land, which they had not been accustomed to do, so as to have established a right thereto.[5] If the roots encroach on the adjoin-

1 Lyon *v.* Fishmonger's Co. L. R. 10 Ch. 689; the decision has been appealed against, but is not yet reported.

2 Cubitt *v.* Power, 8 B. and C. 257; Wiltshire *v.* Sidford, id. 359.

3 Stedman *v.* Smith, 8 E. and B. 1; for American cases, see 2 Hilliard, 14.

4 Vowles *v.* Miller, 3 Taunt. 137.

5 Lonsdale *v.* Nelson, 2 B. and C. 311.

ing land, the occupier has a right to cut them therein himself.[1]

170. A trespass on realty may be by the straying of a man's cattle upon his neighbour's land; and though there is no fence between their lands, each is bound to keep his own beasts on his own land.[2] Any intrusion will be a sufficient trespass, as where one horse bites or kicks another across a hedge.[3] If one man is bound to repair the fence for the benefit of his neighbour, and cattle escape from off the land of the latter, it is no excuse that the fences were out of repair, if the beasts were trespassers in the place from whence they came.[4] Where there is a prescriptive obligation to maintain a fence, it is absolute to keep up a sufficient fence at all times, (the act of God or *vis major* only excepted,) without any notice of want of repair; and if cattle rightly on adjoining land trespass and are injured thereby, the obligor is liable.[5] Besides an action for damages there is also the further remedy that a man may distrain cattle, thus taken doing damage, till the owner shall make him satisfaction.

Trespass by cattle straying.

171. A trespass may be a continuing as well as a temporary one. Thus, if a man throws a heap of stones, or plants posts or rails on his neighbour's land, it is a continuing trespass, and the right to sue will continue from day to day till the incumbrance is removed. An action may be brought for the original trespass in placing the incumbrance, and another action for

Continuing trespass.

1 See French Civil Code, art. 672.

2 Boyle *v.* Tamlin, 6 B. and C. 329; Lee *v.* Riley, 11 Jur. N. S. 527; see id. 822.

3 Ellis *v.* Loftus, L. R. 10 C. P. 10.

4 Dovaston *v.* Payne, 2 Sm. L. C. 113.

5 Lawrence *v.* Jenkins, L. R. 8 Q. B. 274.

continuing it; for the recovery of damages in the first action, by way of satisfaction for the wrong, does not operate as a purchase of a right to continue the injury.[1] So, in these or the like cases, there may be an injunction to prevent the continuance of the injury.[2]

Trespass by one joint occupant.

172. Where land, &c. is in the joint occupancy of several, as tenants-in-common and others, one may sue the other in trespass for whatever amounts to a taking away of the very substance of the property, or to an exclusion; as where one tenant-in-common carries away the soil of the land, or turns the other or his servants off the land, or out of the house holden in common.[3]

When a reversioner may sue.

173. Where there is actual damage of a permanent nature such as to deteriorate the marketable value of the property, the landlord or reversioner may recover the same; though, in English law, the proper form of action was then trespass upon the case.[4] The removal of the smallest portion of the soil is in general such a damage.[5] So, for permanent damage to buildings or trees, both the lessor and the lessee may have their respective actions.[6] So, if a road is obstructed so as to affect the permanent right of way, it might be a damage to the lessor:[7] but an entry made in the exercise of an alleged right of way would not be, for such an act would not be evidence of any right as against the reversioner.[8]

1 Holmes *v.* Wilson, 10 Ad. and E. 503.

2 See Collett on Injunctions, 95 *et seq;* Allen *v.* Martin, L. R. 20 Eq. 462.

3 Murray *v.* Hall, 7 C. B. 441; see 2 Hilliard, 299; but see Jacobs *v.* Seward, ante § 160.

4 Jesser *v.* Gifford, 4 Bur. 2141.

5 Alston *v.* Scales, 9 Bing. 4.

6 Hosking *v.* Phillips, 3 Exch. 168; Bedingfield *v.* Onslow, 3 Lev. 209.

7 Kidgill *v.* Moor, 9 C. B. 378.

8 Baxter *v.* Taylor, 4 B. and Ad. 72.

Defences to an action for trespass.

Leave and license.

174. There may be various defences to an action for trespass. Thus, a defendant may plead that he was justified by reason of prescription, as by showing a right of common, or right of way over the land; or that his right of way was wrongfully obstructed by the plaintiff, and the trespass was necessary to avoid it.[1] So he may plead leave and license which may be express or implied. The license to be a good defence, must be from one having authority to give such, and it must be co-extensive with the acts complained of, or the plaintiff may recover for the acts in excess.[2] So, it must be acted upon in the ordinary and intended way; a license to enter a house means by the door, and not through a window.[3] But a license to do a thing includes one for doing everything necessary for the doing of the act licensed. If obtained by wilful deceit it is a mere nullity, and will not justify a party thereto.[4] Where there was a mistake without fraud, the license is also a nullity, but the mistake will go in reduction of damages.[5] Where the plaintiff had carried off the goods of the defendant on to his own land, the defendant may plead an implied license to enter and retake them.[6] But if the plaintiff has sold goods to the defendant which remain on plaintiff's premises, there is no such implied license to defendant to enter and remove them.[7] So, there is an implied license to enter a shop or public-house.[8]

1 Marshall *v.* Ulleswater Co. L. R. 7 Q. B. 166.
2 Taylor *v.* Fisher, Cro. Eliz. 245.
3 Ancaster *v.* Milling, 2 Dowl. and Ry. 714.
4 Roper *v.* Harper, 4 Bing. N. C. 20.
5 Bridges *v.* Blanchard, 1 Ad. and E. 551.
6 Patrick *v.* Colerick, 3 M. and W. 485.
7 Williams *v.* Morris, 8 M. and W. 488.
8 3 Bl. Com. 212.

175. There may be a license or authority in law. Thus, one may enter upon the land of another to demand or pay money payable there.[1] So, a reversioner may enter to see if waste is committed by the tenant; or a landlord at the expiration of his lease;[2] or a person may justify an entry to abate a nuisance, or to prevent the commission of a heinous offence; or an entry may be justified by necessity, as where a man is in danger of his life; so, if a man's tree is blown down, and falls into another's field, he may enter to take it away, but not if he lops branches and lets them fall into the field.[3] So, the entry may be by express authority in law, as in the execution of process, and in such case the special law prescribing the mode of execution must be consulted.

License in law.

176. Except in the case of a reversioner, no actual pecuniary loss need be shown, and circumstances of aggravation attending the trespass, as the insulting and abusive conduct of the defendant, may be taken into consideration.[4] In respect to trespasses on dwelling-houses especially, exemplary damages may be awarded.[5] The damages awarded should be apportioned to the interest of the plaintiff, as where lessor and lessee severally bring actions, or in the case of an out-going tenant, or a mere tenant on sufferance or at will. Where there are several co-trespassers, each is liable for the whole of the damage done by all.[6] It is the same as to all joint wrongdoers; but a judgment against one of several joint tort-feasors is, though not satisfied, a

Facts affecting damages.

Joint tort-feasors.

1 Broom's Com. 786.
2 2 Hilliard, 88.
3 Bro. Trespass, pl. 213.
4 Merest v. Harvey, 5 Taunt. 441.
5 Rogers v. Spence, 13 M. and W. 581.
6 Hume v. Oldacre, 1 Stark. 352.

bar to an action against the others; for all might have been sued together, and the damages which were before uncertain are made certain by the judgment against the one, and there cannot be divers actions with different damages against the others. If the tort be a continuing wrong, there may be a fresh action against any or all for such continuation, for it is a new cause of action.[1]

Torts to realty by breach of duty.

177. Passing from torts to real property by the invasion of some right good against all the world, there are next to be considered torts to such objects by the breach of some duty, public or private, coupled with special damage to an individual. The instance of a nuisance may first be taken; but nuisance (like trespass) is a word capable of a wide sense; the word means annoyance, or anything that works hurt, inconvenience, or damage,[2] and may include any infringement upon the enjoyment of territorial or personal rights.[3] In the Limitation Act IX of 1871 it is more strictly defined as anything done to the hurt or annoyance of another's immoveable property and not amounting to a trespass. If one digs a trench across a public road, it is a public nuisance; and if a person falls into it, and is hurt, he may have an action against the wrongdoer, but then the act was an invasion of a general right of all to use the road. So, if A builds on his own land so as to darken the ancient lights in his neighbour B's house, it is a private nuisance, but then the duty of A to B is not one existing at-common-law, but arises from grant or prescription, and is more properly classed as a servitude. It will be

NUISANCE, meaning of the term.

1 Brinsmead *v.* Harrison, L. R. 6 C. P. 584 and 7 C. P. 547; the rule in America seems to be different.

2 Tomlin's Law Dictionary.

3 Addison, 134.

better to exclude such cases, and here to restrict the term nuisance to where one so uses his own real property as to infringe upon the common law rights of others, and so commits a breach of duty, either towards the public generally, or some one or more of his neighbours in particular.

178. In this sense of the term also, a nuisance may be either a public or private one. It is a public nuisance when it is such in its nature or consequences as to be a damage to all persons who come within the sphere of its operation, though it may be so in a greater degree to some than it is to others; a factory emitting volumes of noxious smoke or poisonous effluvia is such; where the thing complained of is such as to be a great annoyance to those immediately within its operation, but none whatever or even pleasureable to those more removed from it, it is a private nuisance; such would be the habitual ringing of bells, or performance of loud music to a neighbour. But if a private individual suffers a special and distinct damage from a public nuisance, he may have an action.[1] To constitute even a private nuisance the inconvenience must not be merely fanciful, but one materially interfering with the ordinary comfort, physically, of human existence, according to plain, sober, and simple notions of living.[2] The remedy for a public nuisance is by indictment, or under the authority of the magistracy or police; the remedy for a private nuisance, or for special damage from a public one, is by an action, to which may be added an injunction to prevent the continuance or repetition of the injury.

Nuisances are public or private.

1 Soltau *v.* DeHeld, 2 Sim. N. S. 133; Benjamin *v.* Storr, L. R. 9 C. P. 400.

2 Walter *v.* Selfe, 4 DeG. and S. 135.

179. Nuisances, even in the above restricted sense of the term, may be various; thus, the setting up of noxious or noisy trades, as limekilns, tanpits, forges; or the erecting privies or making cesspools, or burning lime or bricks so near to a dwelling house that the smoke and smell thereof enter the house, and render it unfit for habitation, are nuisances.

Instances of.

180. If a landowner makes a sewer on his own land to drain his own premises, and, from its faulty construction, the sewer becomes a nuisance by the filth percolating through into the adjoining houses or premises, he will be responsible for a nuisance, although the adjoining occupiers are his own tenants.[1] He whose neglect of a duty is the proximate cause of damage, is liable, though there was also a duty on some third person, which, if performed, would have left the other's neglect without consequences. Though A is bound to keep the outlet of a drain in order, and neglects it, yet if B was bound to keep the bank or wall in order, he is liable to C for a damage, from a defect in the bank or wall, though but for A's neglect B's neglect would have been harmless.[2] If one purchases premises with a nuisance upon them, though there was a demise for a term, so that the purchaser has no opportunity for removing the nuisance, yet he is liable for the continuance of the nuisance; but not if the nuisance is erected by the occupier after the purchase, unless the tenancy was for a short period, and the landlord chose to renew it after the erection of the nuisance; for he is not to let the land with the nuisance upon it.[3] So, a landlord is

Who is liable for a nuisance.

1 Alston *v.* Grant, 3 E. and B. 128.

2 Harrison *v.* G. Northern Ry. Co. 10 Jur. N. S. 992; Collins *v.* M. L. Com. L. R. 4 C. P. 279, and see ante § 126 a.

3 Rex *v.* Pedley, 1 Ad. and E. 822.

liable where the tenancy is such that he might have terminated it in order to abate the nuisance.[1] A landowner cannot get rid of his responsibility for an existing nuisance by granting or conveying the land to another; for before the assignment he was liable, and it is not in his power to discharge himself by granting it over, especially if he reserves a rent, for then he has a recompense for it; and it is a fundamental principle of law and reason that he that does the first wrong, shall answer for all consequential damages.[2] Where a nuisance was created by a stranger on the land of the defendant he is not liable for its continuance if it be without his assent and not for his benefit.[3]

Liability of landlord and tenant.

181. Whenever the very existence of the thing demised constitutes a nuisance, the landlord is responsible; as where privies are erected in such a situation that the use of them must necessarily create a nuisance.[4] But if a landlord demises premises which are not in themselves a nuisance, but may or may not become a nuisance, according to the mode in which they are used by the tenant, the landlord cannot be made responsible for a nuisance created upon them by a tenant.[5] He is not responsible for enabling the tenant to commit a nuisance, if he pleases. The occupier is the party then liable. The tenant if bound to repair is liable, and not the landlord, for an injury from the defective state of the premises, though the defect existed at the time of the demise, provided the land-

1 Gandy v. Jubber, 10 Jur. N. S. 652.

2 Roswell v. Prior, 12 Mod. 639.

3 Saxby v. M. and S. Ry. Co. L. R. 4 C. P. 198.

4 Rex v. Pedley, 1 Ad. and E. 822; Thompson v. Gibson, 7 M. and W. 456.

5 Rich v. Basterfield, 4 C. B. 804.

lord was not negligent in being ignorant of the defect.[1] So, every occupier is bound to prevent the filth from his drains or cesspools filtering through the ground into his neighbour's house or land.[2] The occupier is also liable where the nuisance is from the acts of one to whom he grants a license to do certain acts on his land.[3]

182. Although the carrying on of a lawful trade does annoy another to the extent of rendering his residence less agreeable, yet it will not be an actionable nuisance, if, having regard to place and time, the act was an ordinary, reasonable, and proper use of the land by the defendant, not substantially incommoding the plaintiff.[4] It will be so, if real, sensible damage is done to property, though the business was an ordinary one, carried on in a proper manner, and in a place more or less devoted to like purposes.[5] But the carrying on, in the ordinary and obvious manner, a lawful trade, is not necessarily carrying it on in a proper manner, if the annoyance might have been avoided by certain expedients.[6] In such cases it lies upon the defendant to show that the trade is lawful, and carried on in a lawful and convenient place and manner.[7] But there may be a right by prescription to carry on a noxious or noisy trade in a particular spot, but till such prescriptive right is acquired, it is no answer that the nuisance existed before the plaintiff went to live near

Lawful trade in a proper place.

1 Gwinnell *v.* Eamer, L. R. 10 C. P. 661; Pretty *v.* Bickmore, L. R. 8 C. P. 401.

2 Tenant *v.* Golding, 1 Salk. 21.

3 White *v.* Jameson, L. R. 18 Eq. 303.

4 Bamford *v.* Turnley, 9 Jur. N. S. 377; Cavey *v.* Lidbetter, id. 798; Wanstead *v.* Hill, id. 972; Gale on Easements, (3rd ed.) 409; Salvin *v.* North B. C. Co. L. R. 9 Ch. 705.

5 St. Helen's S. Co. *v.* Tipping, 11 Jur. N. S. 785.

6 Stockport W. Co. *v.* Potter, 7 Jur. N. S. 880.

7 Ibid.

it, or even perhaps before his house was built.[1] No length of time can legalise a public nuisance, though it may supply a defence to an action by a private person;[2] but time will not always supply such a defence, when the nuisance is one that has been gradually increasing.[3]

Noise may be a nuisance.

183. So, quietness and freedom from noise, smoke or noxious vapour are indispensable to the full and free enjoyment of a dwelling house. If one carries on any noisy trade adjoining a dwelling house, whereby the comfort and quiet of the house are materially destroyed, especially if so at night, he is liable for a nuisance unless he can show a prescriptive right.[4] So, blowing a horn or making other noises at night may be a nuisance.[5] So the collecting noisy crowds by the attractions of music, fireworks, &c., is a nuisance.[6]

Actions for a nuisance.

184. Where there is any immediate danger to life or property from the continuance of the nuisance, so as to render it unsafe to wait for its removal by the occupier, the injured party may at once enter and remove it; otherwise before entry there ought to be notice to the occupier to abate;[7] but generally the proper course is to appeal to the law.[8] In abating a nuisance no more damage may be done than is necessary; and if the act has to be done on the land of a third person, (as in stop-

1 Bliss *v.* Hall, 6 Scott, 500; Gale on E. 380—404; Tipping *v.* St. Helen's S. Co. L. R. 1 Ch. 66.

2 Weld *v.* Hornby, 7 East. 199; s. 24 Act IX of 1871.

3 Goldsmid *v.* Tunbridge, Com. L. R. 1 Eq. 161, S. C.; id. 1 Ch. 349; see also Atty.-Genl. *v.* Bradford, L. R. 2 Eq. 82.

4 Crump *v.* Lambert, L. R. 3 Eq. 409; Gaunt *v.* Fynney, L. R. 8 Ch. 8; Ball *v.* Ray, 8 Ch. 467; Broder *v.* Saillard, 2 Ch. D. 692.

5 Rex *v.* Smith, 2 Str. 703.

6 Walker *v.* Brewster, L. R. 5 Eq. 25; Inchbald *v.* Robinson, id. 4 Ch. 388.

7 Jones *v.* Jones, 1 H. and C. 1; 31 L. J. 506 Exch.

8 Lonsdale *v.* Nelson, 2 B. and C. 311.

ping a water-course) it should be done so as to cause no damage at least to him, and, consistently with that, as little as may be to the author of the nuisance.[1] Though a man on request abates a nuisance, he is still liable for damage already sustained.[2] The continuance of a nuisance is a fresh injury, for which another action may be brought, and so, again and again, until it is removed.[3]

Who may sue and be sued.

185. If the injured property is in the occupation of tenants, the landlord or reversioner has no right of action, unless the nuisance is of a permanent character, and necessarily inflicts a lasting damage to the inheritance;[4] as where it is by reason of the erection of a building which would, if allowed to continue, impose a servitude upon the plaintiff's building.[5] Every person who does, or directs the doing of, an act which cannot be done at all without constituting a nuisance, is personally responsible, whether he was acting for himself, or for or on behalf, or for the benefit, of another; and whether he is a principal and employer, or a mere servant carrying into effect the orders of his master.[6] But if the act is lawful and may be done without causing a nuisance, then the liability depends upon whether the person is a servant, or contractor or sub-contractor.[7] Though mere diminution in value of the plaintiff's property does not, by itself, constitute a nuisance, yet the extent of the nuisance, if it be a nuisance, may be materially shown by this.[8]

1 Roberts *v.* Rose, 10 Jur. N. S. 570; S. C. L. R. 1 Exch. 82.

2 Bell *v.* Twentyman, 1 Q. B. 774.

3 Shadwell *v.* Hutchinson, 4 C. and P. 333.

4 Mumford *v.* Oxford, &c. Ry. Co. 1 H. and N. 35; Simpson *v.* Savage, 26 L. J. 50 C. P.

5 Tucker *v.* Newman, 11 Ad. and E. 40.

6 Wilson *v.* Peto, 6 Moore, 49.

7 See ante § 114, 119, and 122.

8 Soltau *v.* DeHeld, 2 Sim. N. S. 133.

Right to water.

186. Another instance of tort by breach of a private duty existing at common law, and owing from one man to another by reason of the vicinity of their property, is an invasion of the right to water. Such injuries may be, and commonly are, classed as nuisances, as where the act consists in fouling a stream of water; but it will be convenient to take these cases separately, and to include those in which the right to the water exists, not at common law, but as an easement acquired by prescription, or grant, express or implied. It will be well also to distinguish between the rights to surface and subterranean waters, and between natural and artificial streams.

Use of surface water.

187. The right to use surface water (for there is no *property* in the water),[1] flowing in a natural and defined course, exists by natural or universal law.[2] Each proprietor of land through which water so runs, has a right to use the same for any reasonable purpose of his own, not inconsistent with a similar right in the proprietors of the land above or below; but he may not seriously diminish the quantity, or injure the quality of the water which would otherwise descend, to the damage of a proprietor below, save under a title by grant or prescription; nor can he, without the license or grant of a proprietor above, pen or dam back the water, so as to cause actual damage to him.[3] But without causing that, he may divert or throw back the water; but he must not shut the gates of his dams, and detain the water unreasonably, nor let it off in unusual quantities, to the prejudice of either of

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1 *per* Story, J. in Tyler *v.* Wilkinson, 4 Mason, 397; Mason *v.* Hill, 5 B. and Ad. 1; Bush *v.* Trowbridge W. Co. L. R. 10 Ch. 459.

2 Sury *v.* Pigot, Tudor's L. C. on R. Pro. 118.

3 Embrey *v.* Owen, 6 Exch. 353; Lord Norbury *v.* Kitchen, 9 Jur. N. S. 132.

his neighbours.[1] A fence or bulwark on the bank is allowable, but any encroachment on the bed of a river (whether tidal or not) is an injury, though it is not shown that damage had been sustained, or is likely to be sustained; and this is so though the property in the soil extends to the middle line of the bed.[2] In case of an extraordinary casualty, as a flood, a man has a right to protect himself against it, though in result his neighbour is damaged; but the right does not extend to interrupting the course of the natural flow of the water.[3] The rights of a riparian proprietor as to take water, cannot, it has been said, be granted away in gross so as to give the grantee a right of action; the rights are annexed to the possession of the land.[4] It is impossible to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application. It is entirely a question of degree with a view to the circumstances of each case, the volume of water, the extent of diminution, and the damage inflicted on others.[5] He who first applies running water to irrigation or other purposes, does not thereby acquire an extended right, as against others, until his enjoyment has been long enough to give him a title by prescription; but, till then, the right is only to the natural use, which must be such as not essentially to destroy the natural flow to the damage of those above or below him.[6] It is no defence that the proprietor above or

1 3 Kent's Com. (9th ed.) 573; 1 Hilliard, 686.

2 Bickett *v.* Morris, L. R. 1 H. L. Sc. 47; Atty.-Genl. *v.* Lonsdale, L. R. 7 Eq. 377; Atty.-G. *v.* Terry, L. R. 9 Ch. 423.

3 Nield *v.* L. and N. W. Ry. Co. L. R. 10 Exch. 4.

4 Stockport W. Co. *v.* Potter, 10 Jur. N. S. 1005; but see Nuttall *v.* Bracewell, L. R. 2 Exch. 1, and see 3 Austin's Jur. 37.

5 Embrey *v.* Owen, 6 Exch. 353; Rochdale C. Co. *v.* King, 14 Q. B. 135; Gale on E. 235 (n.); Wilts, &c. *v.* Swindon W. Co. L. R. 9 Ch. 451, and 7 H. L. 704.

6 Miner *v.* Gilmour, 12 Moore's P. C. 156; Wright *v.* Howard, 1 S. and S. 190; Mason *v.* Hill, 5 B. and Ad. 1.

below has not applied the water to any special use or purpose, but he may recover for the loss of the general benefit of the water. An extended or exclusive use may be acquired by prescription, but then it is an easement, and not a natural right;[1] and such an easement may be vested in a community as the inhabitants of a town, so that any inhabitant may sue for an obstruction though no particular personal damage is shown, as the act is in derogation of his rights and would be evidence in future in favour of the wrong-doer.[2] But a use by the proprietor below that does not affect the proprietor above, as an excessive diversion of the water, cannot, by any length of time, give an easement to the former against the latter.[3] If a man first occupies a stream and turns it to use, where there are neither occupants below nor above him, as in waste jungle lands in India, no question could arise; for then those afterwards coming to the stream must take it as they found it.[4]

Right to water in a pure state.

188. The right to running water includes a right to it in its natural purity; but a right to pollute a natural stream may be acquired by grant or prescription, though such enjoyment, or any other kind of enjoyment in excess of the natural right, will not begin to be adverse and of right, until the injurious effect is suffered; for, at first, or for many years the deposit or other user, resulting in damage, may have been imperceptible.[5] The right to the use of water will not be affected by the supply being precarious or interrupted; nor by a slight alteration, by the plaintiff, of the natural course.[6]

1 Sampson *v.* Hoddinott, 1 C. B. N. S. 611.

2 Harrop *v.* Hirst, L. R. 4 Exch. 43.

3 Stockport W. Co. *v.* Potter, supra.

4 Norton's Top. Jur. 498.

5 Murgatroyd *v.* Robinson, 7 E. and B. 391; Simpson *v.* Hoddinott, 1 C. B. N. S. 611; Crossley *v.* Lightowler, L. R. 2 Ch. 478.

6 Hall *v.* Swift, 6 Sc. 169.

189. Surface waters not running in a defined channel, but spreading over the land, may be used by the occupant of the land for any purpose;[1] but a natural visible supply from a spring head must not be cut off, nor prevented from falling below into a regular natural channel;[2] and drains should be so arranged as to restore the water at the boundary of an estate to its ancient or natural channels.[3] An occupant is not entitled to intercept the natural flow of such water from surface springs by draining it into a reservoir or by otherwise diverting it, where it flows naturally, though not through perfectly defined channels, into another's land.[4] To constitute a watercourse in which a neighbour may claim a right, the flow of water must possess that unity of character by which the flow on one person's land can be identified with that on his neighbour's land. Water which squanders itself over an indefinite surface is not a proper subject-matter for such a right.[5] Where there is a natural stream of water which ultimately dissipates itself over the surface, and a course is then cut for the water, the right acquired therein is the same as in a natural stream.[6]

Where the course is not defined.

190. So, where subterranean water flows in a known and defined course, its diversion or pollution will be an injury as much as if it ran on the surface.[7] But usually the course of such water is not ascertainable, and the general rule is that one man may, in his

Subterranean water.

1 Rawstron *v.* Taylor, 11 Exch. 369; Broadbent *v.* Ramsbotham, 11 Exch. 602.
2 Dudden *v.* Chetton Union, 1 H. & N. 627; 26 L. J. 146 Exch.
3 Addison, 49; 1 Hilliard, 683.
4 Ennor *v.* Barwell, 6 Jur. N. S. 1233.
5 Briscoe *v.* Drought, 11 Ir. C. L. R. 250.
6 Holker *v.* Porritt, L. R. 8 Exch. 107, and 10 Exch. 59.
7 Dickenson *v.* G. Junction C. Co. 7 Exch. 300; Hodgkinson *v.* Ennor, 9 Jur. N. S. 1152.

own land, sink a well or shaft for a mine, though he may thereby drain his neighbour's well dry; and there is no limit to the quantity of water he may raise, or the use he may make of it. A different rule would often interfere with the enjoyment of the property in the sub-soil; and where the course of the under-ground water was unknown, there is no room to imply any mutual consent or agreement between the neighbours.[1] There is no distinction between where the effect of a well is to divert water from ancient springs or running streams to the damage of others, and where it merely drains the artificial wells of others; the right to the use of a natural stream does not extend to acts done beyond the stream; otherwise it would govern the use of the whole country originally drained by the stream.[2] But it would seem that A must be liable for an act done on his own land causing the flow of subterranean water into B's land, or the pollution of water percolating into it; for such an act could only be justified as an easement.[3]

191. The rights and duties as to artificial water-courses exist, not at common law, but by contract, grant, or prescription, that is, the right to such a water-course is an easement; but there can be no prescription where no grant ought, under the circumstances, to be presumed; thus, if A, for his own convenience, drains his land, his mine, or his house, he may acquire the easement or right of discharging the water upon or through the land of B; but though B may use such water for any number of years, he will not thereby acquire a right to it, but A may,

Artificial water-courses.

1 Acton *v.* Blundell, 12 M. and W. 324; Reg. *v.* Metropolitan B. W. 9 Jur. N. S. 1009; Ballacorkish Co. *v.* Harrison, L. R. 5 P. C. 63.

2 Chasemore *v.* Richards, 7 H. L. C. 349; 5 Jur. N. S. 870.

3 See Smith *v.* Kenrick, 7 C. B. 515, and Gale on E. 364.

for his own purposes, divert or remove the water-course; from the very nature of the case, no intention in A to subject himself to a permanent servitude, can be inferred.[1] It will be otherwise if from the facts, a different intention ought to be presumed.[2] But generally, the presumption in favour of an easement from the benefit resulting by the act of another done on his own land is neutralised by the act being essential to the owner, and so done with a view to his own interest alone; for an easement exists for the benefit of the dominant owner alone; and hence it is that the servient owner acquires no right to insist on its continuance, or to ask for damages on its abandonment.[3] If A has acquired the easement of discharging clean water only, he would be liable for polluting the stream, and much more would any one else.[4] Though as against A, B cannot acquire a right to the continuance of the stream, he may, it seems, acquire such a right by lapse of time against others so as to prevent them from diverting or polluting the flow of water.[5]

Liability of grantee of such water-course.

192. The grantee of an artificial water-course or drain through the land of another, for the use and benefit of the grantee, is bound to maintain and repair it, and he has a right of entry upon the land of the other for that purpose. He is liable for any damage resulting from non-repair.[6] If having a right to send clean water through the drain, he sends foul water

1 Arkwright *v.* Gell, 5 M. & W. 203; Major *v.* Chadwick, 11 Ad. & E. 571; Staffordshire C. Co. *v.* Birmingham, &c. Co. 11 Jur. N. S. 71.

2 Iviney *v.* Stocker, L. R. 1 Ch. 396.

3 Hudson *v.* Tabor, 1 Q. B. D. 230; Mason *v.* S. & H. Ry. Co. L. R. 6 Q. B. 587.

4 Wood *v.* Waud, 3 Exch. 748.

5 Sutcliffe *v.* Booth, 9 Jur. N. S. 1037; Major *v.* Chadwick, supra; but see contra Wood *v.* Waud, supra.

6 Pomfret *v.* Ricroft, 1 Saund. 322; Egremont *v.* Pulman, M. & M. 404.

of filth, the other may stop every particle of water, because it is dirty.[1]

193. Another right existing by reason of vicinage, is the right of support of land by land, of buildings by land, or of buildings by buildings. The duty of leaving such natural support to land, as also the duty of not obstructing the natural flow of water to the damage of others, are sometimes called necessary servitudes; but a servitude involves the idea of something done upon, or some right exercised over, the servient tenement that obstructs the exercise of full dominion over it by the owner. The subject of the right of support may be divided into the lateral support of land by adjacent land, the vertical support of the surface by the sub-soil (where the property in the two is distinct), the support of buildings vertically by subjacent soil, the support of buildings laterally by adjacent soil, and the support of buildings by buildings in juxtaposition. In some of these instances the right is a natural one, in others acquired.

THE RIGHT OF SUPPORT.

194. Every proprietor of land is entitled of common right to such an amount of lateral support from the adjoining land of his neighbour, as is necessary to sustain his own land in its natural state, not weighted by walls or buildings. One may not dig in his own land so near that of another, that the other's land falls into his pit. This is a natural right, but to be entitled to it the land must be in its natural condition;[2] thus, if a man digs in his own land, a well quite close to his neighbour's land, no action will lie, if the latter, by digging in his own land,

Support of land by land.

1 Cawkwell *v.* Russell, 26 L. J. 34 Exch.

2 Humphries *v.* Brogden, 12 Q. B. 739.

lets out the water in the well; and from the nature of the right there can be no infringement of it, so as to give a cause of action without some appreciable damage ensuing.[1] But a right of support in extension of the natural right may be acquired by uninterrupted user of right for the requisite term of years.[2]

Support of surface by sub-soil.

195. If the owner of land grants the sub-soil, reserving the surface to himself, he impliedly grants reasonable means of access to the sub-soil, and the grantee would have a right to go upon and dig through the surface, to enable him to reach the sub-soil, if he had no other means of access thereto. But the owner of the sub-soil may maintain an action against the owner of the surface, if he digs holes into the sub-soil to a greater extent than is reasonably necessary for the proper and fair use, cultivation, and enjoyment of the surface; or if he removes so much of the surface that mines below are flooded.[3] So, the owner of the surface is entitled of common right to the support of the subjacent strata, so that the owner of the sub-soil and minerals cannot lawfully remove them, without leaving support sufficient to maintain the surface in its natural state.[4] This right of support does not include the support of subterranean water; and one who by draining his own land (an act incidental to its ordinary use) withdraws the support of water from adjoining land is not liable if the surface subsides.[5] But a right to trench upon these natural rights of support, as to work so as to cause a subsidence, may exist by clear express grant, or be acquired

1 Smith *v.* Thackerah, L. R. 1 C. P. 564.

2 Acton *v.* Blundell, 12 M. and W. 353. See s. 27, Act IX of 1871.

3 Cox *v.* Glue, 5 C. B. 551.

4 Humphries *v.* Brogden, 12 Q. B. 739; 28 L. J. 10 Q. B.; Proud *v.* Bates, 11 Jur. N. S. 441.

5 Popplewell *v.* Hodkinson, L. R. 4 Exch. 248.

by a sufficiently long user as of right.[1] In the case of a mining lease the right to support of the surface is to be gathered from the terms of the lease.[2]

196. If a person has built on the extremity of his own land so as to increase the lateral pressure on the soil of his neighbour, or if the owner of the surface has erected buildings so as to require additional support from the sub-strata, he may, it is said, acquire a right to such support by prescription, that is, by an user of right for a period of years from which a grant of, or acquiescence in, the privilege by the other owner, may be legally presumed; but for this the enjoyment of the support must be obvious, as no easement can be acquired secretly, and as to adjacent soil at least it may not be obvious.[3] But if, within such period, the owner of the adjacent or subjacent soil, digs in his own land so that the buildings fall, he will not be liable for the damage, unless he exercised his right of digging so negligently or improperly as to cause the fall,[4] or unless the weight of the buildings in no way caused the sinking of the land, and the land would have fallen in, whether buildings had been erected on it or not.[5] The right of support in such cases is acquired and not natural; but it is a negative easement, and the right of action arises on a breach of duty by the defendant, in so using his own property as to injure that of his neighbour, and there is no

Support of buildings by land.

1 Rowbotham *v.* Wilson, 6 H. L. C. 348; 6 Jur. N. S. 965; Carlyon *v.* Lovering, 1 H. and N. 797.

2 Eadon *v.* Jeffcock, L. R. 7 Exch. 389.

3 Hide *v.* Thornborough, 2 C. & K. 250; Hunt *v.* Peake, 1 John, 705; 6 Jur. N. S. 1071; Gale on E. 325.

4 Dodd *v.* Holme, 1 A & E. 493; 1 Sm. L. C. 217 (4th ed.)

5 Hamer *v.* Knowles, 6 H. and N. 454; Hunt *v.* Peake, supra; Metr. B. W. *v.* M. Ry. Co. L. R. 4 C. P. 192.

active exercise of any right by the plaintiff in, upon, or over the land of the defendant.[1] Hence, it is not the fact of the excavation by the defendant, but the occurrence of the damage in consequence, that gives rise to the right of action, and the law of limitations begins to run against the plaintiff from the date of the latter only.[2] And it would be the same where damage arises from the invasion of the natural right of support.

Support of buildings by buildings.

197. Where two houses, erected by different owners, stand in juxtaposition, they in fact stand each on its own ground, and there is no right of support for the one by the other, and it will not be presumed to have been acquired however ancient the houses. It may, of course, exist by an express grant. That in fact one house leans on the other does not alter the case; there can be no user of right unless openly and evidently; and a man by building a weak house cannot impose a duty upon his neighbour, or drive him to pull down his own house or bring an action within a fixed period.[3] It would be otherwise where one house was notoriously and obviously supported by the other, and the enjoyment of the privilege can be shown to have been acquiesced in; and where the right to support is by such means as a beam thrust into, or resting upon, a neighbour's wall, then it is properly an easement, being a right exercised in and upon the other's property. Hence, it is not necessary for a person who pulls down his wall to give notice of his intention to the owner of an adjoining wall;[4] and whether or not he does so, he is not

1 Gale on E. 323.

2 Bonomi *v.* Backhouse, E. B. & E. 622; 7 Jur. N. S. 809. See also s. 25, Act IX of 1871.

3 Solomon *v.* Vintners Co. 4 H. and N. 585; 28 L. J. 370 Exch.

4 Chadwick *v.* Trower, 6 Bing. N. C. 1; 8 Sc. 1.

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bound to use more than reasonable and ordinary care in pulling down his own buildings.[1] But he would be liable if he acted in a careless and negligent manner thereby causing the fall; and that, though the owner of the injured house did not do all he could to protect himself, as by shoring it up.[2]

Where there was once unity of ownership.

198. If one man builds two or more houses, and each needs the support of the other, and then he sells one, it is presumed that he reserves for himself and grants to the buyer, the right of mutual support; and so, if he sells several such houses to several persons at different times, each has the same right of support, without regard to the priority of titles.[3] The same principle would apply where the owner of two fields builds a house on the edge of one, and then sells either the field with the house, or the other, or both to different persons; the grant of the right of requisite support for the house would be presumed. So, if a landowner avowedly sells part of his land for buildings, or for the construction of a bridge or railway, he impliedly grants all such adjacent and subjacent support as is reasonably necessary.[4] Similarly it would be where a house is built on the surface, and then the property in the underlying minerals is separated by a sale.

Negligence causing damage to realty.

199. The general maxim which governs all the above cases of nuisances and the rest, is that a man should so use and enjoy his own property as not to injure that of others. Upon

1 Massey *v.* Goyder, 4 C. and P. 161.

2 Walters *v.* Pfeil, M. and M. 364; Gale on E. 372.

3 Richards *v.* Rose, 9 Exch. 218.

4 Caledonian Ry. Co. *v.* Sprot, 2 Macq. 449.

the same maxim depends the liability for damage resulting from a negligent use of the rights of property, as where damage is done by water or fire escaping or spreading from one man's land to another's. Acts proper for the mere defence of one's property are to be distinguished from acts done for its improvement or use. A may erect a groin to protect his land from the sea or river, though thereby the water flows more violently against B's land; but he cannot improve his land by building a wharf, and so cause damage to B's land.[1]

Damage from water.

One who for his own purposes brings upon his land and collects and keeps there anything, as water, likely to do mischief if it escapes, is *primâ facie* answerable for all the damage which is the natural consequence of its escape.[2] But he will be excused by showing that the escape was the consequence of *vis major* or the act of God, in the sense not that it was physically impossible to resist it, but that it was practically impossible to do so.[3] Where the collection of water is a natural or necessary use of the land, and much more where it is done in accordance with a duty,—as in the case of tanks for irrigation in India,—the owner is not liable if, without negligence on his part, the water escapes and damages the property of another.[4] So also where the storing of water is a reasonable use of property in a way beneficial to the community, or for the common benefit of both parties.[5] Further mere non-feasance by A on his land though thereby damage ensues to B's land, will not

1 Rex *v.* Pagham, 8 B. and C. 355; Sutton *v.* Clarke, 6 Taunt. 44.

2 Fletcher *v.* Rylands, L. R. 1 Exch. 265; id. 3 H. L. 330; Smith *v.* Fletcher, L. R. 7 Exch. 305, and 9 Exch. 64; Wilson *v.* Newberry, L. R. 7 Q. B. 31.

3 Nichols *v.* Marshall, L. R. 10 Exch. 259.

4 Madras Ry. Co. *v.* Carvetanagarum, L. R. 1 In. A. C. 364.

5 Nichols *v.* Marsland, L. R. 10 Exch. 260; Carstairs *v.* Taylor, L. R. 6 Exch. 222; Ross *v.* Fedden, L. R. 7 Q. B. 661.

induce liability; thus, A's neglect to maintain his own sea-wall, whereby the sea flows on to his land and thence on to B's, will not independently of a duty by prescription, make A liable for the damage.[1] The liability also, where it exists, is limited to the owner of the land; if C has contracted to do work on B's land, and the work is prevented or made more expensive by the escape of water from A's land, A is not liable to C.[2] Where there would be a liability in case of damage, the preventive remedy of an injunction may be applied.[3]

Damage from fire.

199, *a*. Every person who puts a dangerous thing in motion which causes damage to another, is, in general, responsible. If a man negligently sets fire to his own house, and it spreads to his neighbour's house, he is liable;[4] but not if the fire spread from some superior cause which could not have been prevented, controlled, or resisted by human agency; as where a fire being lighted in a field, it spreads by reason of a sudden storm; but it would be otherwise, if lighted whilst the wind was high; and blowing in a dangerous direction.[5] If A employs gangs of coolies to clear his land paying them by the gang, but directing their labors, he is liable to B if through their negligence fire spreads from his land to B's.[6] So, if a man knowingly demises buildings in a ruinous state, and afterwards, by mere force of gravitation, and without any default of the

1 Hudson *v.* Tabor, 1 Q. B. D. 225.

2 Cattle *v.* Stockton W. Co. L. R. 10 Q. B. 453.

3 Crompton *v.* Lea, L. R. 19 Eq. 115.

4 Vaughan *v.* Menlove, 4 Scott, 251.

5 Turberville *v.* Stampe, 1 Ld. Raym. 264.

6 Serandat *v.* Saisse, L. R. 1 P. C. 152.

tenant, they fall and damage the neighbour's house, the landlord will be liable.[1]

Where dangerous instruments, &c. are used.

200. Where a man uses dangerous instruments, as a locomotive steam engine, or a blast furnace the mere fact of ignition by the sparks therefrom has been said to be, *primâ facie*, evidence of negligence, and to call for proof, by the defendant, of reasonable precaution.[2] But this doctrine that the happening of mischief, whether to person or property, from such a cause, raises a *primâ facie* case of negligence, is opposed to recent decisions. It seems that there must be proof of well-defined negligence, except where the nature of the accident is not consistent with the absence of negligence,[3] or it arose from the use of a thing of a dangerous nature such as a locomotive engine which the defendant had no express legislative authority to use, and for damage from the use of which he is therefore liable though negligence be negatived.[4] If there are expedients which would render damage next to impossible, the defendant is bound to show that he used them. That a railway company is, by law, authorized to use dangerous engines, does not exempt them from the consequences of negligence in the management of them; and it is the same whether the fire begins on the plaintiff's property, or on the defendant's, and spreads thence to plaintiff's.[5] So, if a person brings gun powder or explosive materials on to his premises, or there mixes together things, which alone are

1 Todd *v.* Flight, 9 C. B., N. S. 377; 7 Jur. N. S. 291. On the proximate cause of damage by negligence, see ante § 126, a.

2 Pigott *v.* Eastern C. Ry. Co. 3 C. B. 229; see ante § 139.

3 Hammack *v.* White, 8 Jur. N. S. 796; G. W. Ry. Co. *v.* Fawcett, 9 Jur. N. S. 339; Czech *v.* Gen. S. N. Co. L. R. 3 C. P. 14, ante § 139.

4 Jones *v.* Festiniog Ry. Co. L. R. 3 Q. B. 733.

5 Vaughan *v.* Taff V. Ry. Co. 5 H. and N. 679; 29 L. J. 247 Exch.; Smith *v.* L. and S. W. Ry. Co. L. R. 5 C. P. 98, S. C. id. 6 C. P. 14.

perfectly innocent, but are liable to explode when brought into contact, he is liable for damage resulting to his neighbour's property.[1] In these and the like cases, if the injured property is in the possession of a tenant, the damages should be apportioned between the landlord and the tenant, in accordance with their respective interests.

Torts to easements.

201. The next class of torts to real property consists of invasions of the private rights of easements, that is, breaches of the private duties of servitudes. These are rights and duties existing by grant, either express, or implied from prescription. An easement is a right, liberty or privilege, which the owner of one tenement (called the dominant tenement), has acquired over another (called the servient tenement), to compel the owner thereof to permit to be done, or to refrain from doing, something on the latter tenement for the advantage of the former.[2] The right is, therefore, either affirmative or negative; it is incorporeal, and is imposed upon one real corporeal property, and must be for the beneficial enjoyment (but without taking any profits) of another real corporeal property. The tenements must belong to different owners, and both the right and duty exist in regard to the properties and not the owners.[3] The benefit or right is called an easement; the corresponding burden or duty is called a servitude, and is a dismemberment of the rights of dominion, or absolute property.[4]

Easement, definition of.

202. A privilege granted to one personally, unconnected

1 Vaughan *v.* Menlove, 4 Scott, 252.

2 Tudor's L. C. on R. Pro. 107.

3 Id. 108; Gale on E. (3rd ed.) 5, 9.

4 The term *servitude*, though borrowed from the Roman law, is not here used to the full extent of its signification in that law; see 3 Austin's Jur. 19, 32, 39.

A personal privilege not an easement.

with the enjoyment by him of land, is not an easement, but a mere personal contract, operative between the parties, but not binding upon the land affected, in the hands of others. Thus, A cannot grant to B personally a right of way over his land, so that it should be annexed as an incident to the estate. It would lead to much confusion to create such novel incidents; and it is not in the power of an owner of land to create rights not connected with the use or enjoyment of land, and to annex them to it, nor can he subject the land to a new species of burden, so as to bind it in the hands of an assignee.[1]

License and grant distinguished.

202, *a*. A license and a grant are to be distinguished. A mere license passes no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful; thus leave by A to B to come on A's land is a mere license, and however given is always revocable.[2] A grant conveys some interest though it may include a license. Leave from A to B to do something on A's land, as to come and make a water-course through it, or to have a right of way over it, is a grant, and by English law requires a deed;[3] but by any law if the grant is good in form and for value, or though not so if the act has been done, and expense incurred in doing it, then in equity, (though not in English law,) the leave is irrevocable.[4] Thirdly, there may be leave from A to B to do something on B's land, the effect of which may

1 Keppell *v.* Bailey, 2 My. & K. 517, 535; Bailey *v.* Stephens, 8 Jur. N. S. 1063; Hill *v.* Tupper, 9 Jur. N. S. 725.

2 Thomas *v.* Sorrell, Vaug. 351; Wood *v.* Leadbitter, 8 M. & W. 838.

3 Ibid.

4 Devonshire *v.* Eglin, 14 Beav. 530; see also Norton's Top. Jur. 484, 490. See recent case of Bankart *v.* Tennant, L. R. 10 Eq. 141.

be either to create an easement for B's land over A's, or to destroy one for A's land over B's; in neither case does even English law require a grant by deed, and in both the act once done by B the leave is irrevocable.[1]

Instances of easements.

203. The most ordinary instances of easements are the rights of air or light, of way, and of artificial water-courses. Incident to the property in land is the right to the air or light from above it: but a right to receive light or air from across a neighbour's property may be acquired, so that nothing can be done thereupon (as by building, &c.;) substantially to interfere with that right. This is an instance of a negative easement. The other two instances are affirmative easements. It is not necessary in order to acquire a right to light or air, that the house should be actually occupied, if it is structurally complete and fit for habitation.[2]

Acquisition of easements.

204. Easements may be acquired by express or implied grant, or by prescription. There may be an implied grant or reservation of continuous and apparent easements on the severance of a tenement into parts; or an implied grant or reservation of easements of necessity. Thus, if the owner of a house and surrounding land sells the house, and retains the land, or sells it to a third person, nothing can be done upon the land so as to obstruct or darken the windows of the house; for, on the sale of the house, there is an implied grant of the right to the lights.[3] But if he retains the house, and sells the land without

Continuous and apparent easements.

1 Winter v. Brockwell, 8 East, 308; Liggins v. Inge, 7 Bing. 682; see a case in 1 Madras H. C. R. 252.

2 Courtauld v. Legh, L. R. 4 Exch. 128.

3 Swansborough v. Coventry, 9 Bing. 305.

reserving the right to the lights, the right is gone, and the buyer may build on the land.[1] So, if houses are unfinished but with spaces obviously for doors and windows, and are then sold separately, access to the doors, or light for the windows, cannot be obstructed.[2] Similarly, as between landlord and tenant there is implied a mutual grant that ways and windows as existing at the time of the demise, shall not be interfered with.[3] The drains to a house are continuous and apparent easements, for they may be seen on proper examination, and will pass on a severance. That such an easement should pass, it should be necessary for the convenient enjoyment of the tenement, but need not be absolutely necessary or unavoidable.[4] A continuous and apparent easement is one which is attended by some alteration of the tenement in its nature obvious and permanent.[5] The prohibition to build on particular land is a non-apparent servitude.[6]

Easements of necessity.

205. The grant of an easement of necessity is implied when it is such that without it the thing granted could not be enjoyed.[7] As where one sells the minerals reserving the surface, or one field surrounded by his own land, a right of way to get at the minerals or the field is an easement of necessity, and is implied to have been granted to the buyer, or reserved by the

1 White *v.* Bass, 8 Jur. N. S. 312; Currier's Co. *v.* Corbett, 11 Jur. N. S. 719; but see Gale on E. 84, 85.

2 Compton *v.* Richards, 1 Price, 27; Glave *v.* Harding, 27 L. J. 286 Exch.

3 Riviere *v.* Bower, 1 R. & M. 24; Hall *v.* Lund, 9 Jur. N. S. 205.

4 Pyer *v.* Carter, 26 L. J. 258 Exch.; Phesey *v.* Vicary, 16 M. & W. 484; but see Suffield *v.* Brown, 10 Jur. N. S. 111, *s. q.* this case. Recent cases on the point are Crossley *v.* Lightowler, L. R. 2 Ch. 486, and Davies *v.* Sear, id. 7 Eq. 427.

5 Gale on E. 85.

6 Id. 21.

7 Gale on E. 111; Liford's case, 11 Rep. 52.

seller, (as the case may be,) though (unlike a continuous and apparent easement) there was no such way or easement before.[1] The necessity is to be understood as it stood at the time of the conveyance and severance;[2] and a necessary easement, in this sense, does not mean only one essentially necessary, but one necessary for the convenient and comfortable enjoyment of the property.[3] But an easement of necessity is commensurate only with the existence of such necessity, and ceases with it. Thus, if the purchaser of the field is afterwards able to get at it by passing over his own land, the former right of way of necessity ceases.[4] A way of necessity, once created, must remain the same as long as it continues at all; its direction cannot be varied.[5]

Acquisition by prescription.

206. But perhaps the most frequent mode of acquiring an easement is by prescription, which, in fact, presumes a grant from long user of right. In England there is a modern statute fixing certain periods for the acquisition of prescriptive rights.[6] Before that, a fiction was resorted to, which presumed a lost grant on proof of enjoyment for twenty years, the Courts adopting that period by analogy to the English statute of limitations.[7] In India ss. 27 and 28, Act IX of 1871, now provide for the acquisition of easements by prescription. Peaceable and open enjoyment as an easement and as of right and without interruption for twenty years up to within two

1 Dand *v.* Kingscote, 6 M. & W. 196; Pinnington *v.* Galland, 9 Exch. 12.

2 Pyer *v.* Carter, 1 H. & N. 922.

3 Ewart *v.* Cochrane, 7 Jur. N. S. 929.

4 Holmes *v.* Goring, 2 Bing. 76. See also the recent cases of Thomson *v.* Waterlow, L. R. 6 Eq. 36, and Langley *v.* Hammond, id. 3 Exch. 161; Kay *v.* Oxley, L. R. 10 Q. B. 360.

5 Pearson *v.* Spencer, 7 Jur. N. S. 1195.

6 2 & 3 W. 4 C. 71.

7 Tudor's L. C. on R. Pro. 141; Gale on E. 134—8.

years of the date of suit, renders the right absolute and indefeasible. But the right of access and use of light or air to and for any building differs from other easements, since the lapse of the above period is conclusive against all persons; but as to other easements a reversioner may exclude the period of possession of the servient tenement by a tenant for life or for a term of more than three years, provided he resists the enjoyment of the easement within three years after the determination of the prior interest. To constitute an interruption of any easement in the period of twenty years, there must be an actual discontinuance from some obstruction by another person known to and acquiesced in for a year by the claimant of the right. It has been held in England and probably would be so in India also, that as there are no negative words in the Act to take away rights existing independently of it, all former modes of acquiring easements may still be relied upon.[1] In any case the right may be defeated by showing a grant for a limited period comprising the whole or part of the time for limitation;[2] and a title to an easement can be prescribed for only in one or other of two ways, either in person or in estate; that is, by showing either that the ancestors, or that the predecessors in title, of the claimant had it during the requisite period.[3]

Essentials to a prescriptive right.

207. It is a general rule that to constitute any title by prescription, there must have been an uninterrupted user as of right, exercised *nec vi, nec clam, nec precario,* that is, neither by force, nor by stealth,

1 Aynsley *v.* Glover, L. R. 10 Ch. 283.

2 Bright *v.* Walker, 1 Cr. M. and R. 211.

3 Ivimey *v.* Stocker, 11 Jur. N. S. 775.

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Limit to the right.

nor at the mere will and favor of the other party.[1] The right claimed must not be so large as to extinguish or destroy all the ordinary uses or profits of the property; for every prescription must be reasonable;[2] and for such things as can have no lawful beginning, a prescription is not good.[3] There cannot be an unlimited claim to go, at all times, and in all directions, over every portion of a field.[4] Where there is a right of way over waste land, the owner may enclose on each side, leaving a convenient way.[5] So, it is a general principle that nothing passes as incident to an easement, but what is requisite to the fair enjoyment of the privilege. So, there can be no easement as to what is a mere matter of convenience and advantage: thus, there is no right to enjoy a certain prospect except by express grant; and if A opens a window that interferes with the privacy of B's premises, the only remedy is for B to build on his own premises so as to obstruct the window.[6] So, the access of wind to a windmill, which turns necessarily to every point of the compass, is too indefinite and extensive a privilege to constitute an easement.[7]

Continuous user.

207, *a*. The nature of the easement may be such that the user is continuous, as a right to light; or it may be intermittent, as a right of way, and then it must be sufficiently frequent to indicate to the owner of the servient tenement that the right is claimed.[8] Unity of possession of the two tenements, though held under

1 Eaton *v.* Swansea W. Co. 17 Q. B. 275; Gale on E. 180—188.

2 Bailey *v.* Stephens, 8 Jur. N. S. 1063.

3 Hoskins *v.* Robins, Vent. 164.

4 Dyce *v.* Hay, 1 Macq. 305; but see Gale on E. 4 (n.), 17 (n).

5 Hutton *v.* Hamboro, 2 F. & F. 218.

6 Tapling *v.* Jones, 11 Jur. N. S. 309; Butt *v.* Imperial G. Co. L. R. 2 Ch. 158; Att.-Genl. *v.* Doughty, 2 Ves. 453.

7 Webb *v.* Bird, 8 Jur. N. S. 621.

8 Bartlett *v.* Downes, 3 B. & C. 621.

unequal estates or of different owners, interrupts the continuous user needed to establish an easement, and the period cannot be made up by adding together different intervals of user.[1] The unity of possession sufficient to interrupt the acquisition of an easement must be distinguished from the unity of ownership needed to extinguish an existing easement.[2]

Uninterrupted user.

208. So, the enjoyment is not uninterrupted, wherever it was had and exercised in spite of the remonstrance or prohibition of the owner of the fee.[3] Where acquiescence in an interruption defeats the prescription, it is not necessary to bring an action in order to show non-acquiescence; any conduct showing such may be given in evidence.[4] So, there can be no prescription against an ignorant man; thus, an easement enjoyed on land let on lease, by the leave of the tenant, but without the knowledge or sanction of the landlord, does not affect the landlord.[5] But the user may, from its nature, or notoriety, be such that the landlord's knowledge and acquiescence may be inferred; and then such knowledge in fact, if coupled with a present right to interrupt the continuance of the user, would affect him.[6] But an user exercised with permission of the tenant, and in spite of the protest of the landlord, can confer no right. The user of a right of way over land let on lease, not being

1 Onley *v.* Gardiner, 4 M. & W. 496.

2 Winship *v.* Hudspeth, 10 Exch. 8; Gale on E. 130 (c.); this note seems erroneous; see infra § 212.

3 Gale on E. 166; Addison, 93.

4 Glover *v.* Coleman, L. R. 10 C. P. 108; Act IX of 1871, s. 27 explan.; Bennison *v.* Cartwright, 10 Jur. N. S. 847.

5 Daniel *v.* North, 11 East, 37; Gray *v.* Bond, 2 B. and B. 667; Gayford *v.* Moffatt, L. R. 4 Ch. 133.

6 Gale on E. 163–174; Chasemore *v.* Richards, 5 Jur. N. S. 873; and see Cross *v.* Lewis, 2 B. and C. 686.

necessarily an injury to the inheritance, the landlord generally could have no action for it, though known to him, and, therefore, such user would be no evidence of right against him.[1] But an act for the acquisition, like an act for the obstruction, of an easement, might be of so permanent a nature as to be an injury to the reversion for which he might sue; as where it would serve as evidence against his right.[2] By the present English statute no title at all is gained (save in the case of light,) except by a user valid against all having estates in the servient tenement;[3] but otherwise there may be an user from which may be presumed a grant of an easement from the owner of a particular estate, (as a tenant for life or lessee,) though not binding on the reversioner in fee.[4] By the English Act actual enjoyment of light for the full period without interruption is all that is needed to confer the right; but by the Indian Act, the user of light or air must be "as an easement and as of right," but the same period gives a valid title against all estates; while as to other easements the proviso in s. 28 is in favor of the reversioner only, so that there might be a title valid against a particular estate though not against the reversioner.

User as of right.

209. The user is not of right where it has been had by asking leave from time to time, or was simply a license of user, as from a landlord to his tenant whilst his tenancy lasted.[5] And, generally, where the enjoyment of the privilege can be satisfactorily ac-

1 Baxter *v.* Taylor, 4 B. and Ad. 76.

2 Tickle *v.* Brown, 4 Ad. and E. 378; Palk *v.* Skinner, 18 Q. B. 575; Kidgill *v.* Moore, 9 C. B. 372.

3 Bright *v.* Walker, 1 C. M. and R. 211.

4 Gale on E. 175; Daniel *v.* Anderson, 8 Jur. N. S. 328.

5 Russell *v.* Harford, L. R. 2 Eq. 507; Polden *v.* Bastard, L. R. 1 Q. B. 156.

counted for, and is consistent with there having been no grant, there is no ground for presuming one.[1] The presumption however is, that a party enjoying an easement acted under a claim of right, until the contrary is shown.[2]

A privilege to the public not an easement.

210. Where the privilege is that of the public generally, and there is in fact no dominant tenement or property in respect to which the privilege is exercised, it is not properly an easement, though very analogous in its mode of acquisition and enjoyment.[3] Such is a privilege to the public of using a piece of ground on particular occasions for such purposes as a fair or festival.[4] Such also is a right of way for the public across a man's property, which depends upon an actual or presumed dedication of the use of such way to the public.[5] Hence there may be a partial as well as a complete dedication, as subject to certain conditions or rights, as for instance the right of the owner to plough across a footpath at the ploughing season,[6] and then the public will have no right to deviate on to the adjoining land because the path is muddy.[7]

Incidents of an easement.

211. It is the part of the owner of the dominant tenement to make the necessary repairs, as of a water-course, drain, or way, within the servient tenement,[8] but he is not, therefore, compellable to

1 Monmouth C. Co. *v.* Harford, 1 C. M. and R. 614.

2 Campbell *v.* Wilson, 3 East, 294.

3 Gale on E. 17 (c.)

4 Tyson *v.* Smith, 9 A. & E. 406; Mounsey *v.* Ismay, 9 Jur. N. S. 306; 11 id. 141.

5 Dovaston *v.* Payne, 2 Sm. L. C. 113. See Wright *v.* M. I. D. L. Ry. Co. L. R. 8 Exch. 144 for a suggestion that every railway is a public highway.

6 Mercer *v.* Woodgate, L. R. 5 Q. B. 26; Arnold *v.* Blaker, L. R. 6 Q. B. 433.

7 Arnold *v.* Holdbrook, L. R. 8 Q. B. 96.

8 Pomfret *v.* Pycroft, 1 Wms. Saund. 322, b.

make them, except where non-repair causes damage to the servient tenement.[1] Where a public way is out of repair, the public may justify trespassing on the land on either side; not so, he who has the benefit of a private way which he is bound to repair.[2] But the grantee of a right of way which the grantor has obstructed may deviate, and such deviation will be protected during the obstruction, without driving the grantee to sue for its removal.[3] An easement may be used in such manner as is necessary for its most commodious enjoyment,[4] but otherwise not so as to produce inconvenience or injury to the owner of the servient tenement, nor in any case so as to increase the proper burden or restriction placed by it on the servient tenement.[5] So, the mode or object of its enjoyment must not be deviated from or extended; the grant of a way to one field does not justify its use as a way to a dozen other fields;[6] so, the right of way may be for horses or passengers, and not for carriages; or for some kinds of animals, as for sheep and cattle, and not for elephants or camels; or the right of way may be limited to particular purposes or seasons, as for the transit of ores or coals only, or during harvest time, or on market days, or for agricultural purposes only.[7]

Extinguishments of easements.

212. An easement may be extinguished in various ways, as by unity of possession of the two tenements, by leave and license, by non-user or

1 Duncan *v.* Louch, 6 Q. B. 910; Egremont *v.* Pulman, M. & M. 404.

2 Taylor *v.* Whitehead, 2 Doug. 745.

3 Selby *v.* Nettlefield, L. R. 9 Ch. 111.

4 Senhouse *v.* Christian, 1 T. R. 560; Dand *v.* Kingscote, 6 M. & W. 174.

5 Gerrard *v.* Cooke, 2 B. and P. (N. R.) 115.

6 Ward *v.* Lawton, 1 Ld. Raym. 75; Heming *v.* Barnet, 8 Exch. 192.

7 Ballard *v.* Dyson, 1 Taunt. 279; Wimbledon *v.* Dixon, 1 Ch. D. 362.

cesser of the purpose of the easement, or by the acts of the owner of the dominant tenement. Where there occurs an unity of the ownership of the dominant and servient tenements, an easement may be extinguished; but to operate as an extinguishment the party must have an estate in fee simple in both lands, equal in duration, quality, and all other circumstances.[1] If the ownership becomes separate again, and nothing has been done in the meanwhile to alter the character of the easement, as by obstructing a window, or altering a way, then a continuous and apparent easement will be revived; but not so as to non-apparent easements, unless on the separation apt words are used for the purpose.[2] So, the revival may be upon partition after a descent to co-parceners. Correctly speaking, the old right does not revive, but a right arises such as would arise on a severance where there had never before been separate ownership.[3]

By unity of ownership.

213. So, the owner of the dominant tenement may verbally or otherwise authorize the other owner to do an act of notoriety upon his own land, which, when done, will be inconsistent with the continued enjoyment of the easement, and an authority so given and acted upon, cannot be revoked.[4]

By leave and license.

214. So, an easement may be lost by abandonment or non-user. What amounts to this depends upon the nature of the easement, and the circumstances of the case. It is not so much the duration of the cessation of enjoyment, as the nature of the act done

By non-user.

1 Rex *v.* Hermitage, Carth. 239; Thomas *v.* Thomas, 1 C. M. & R. 41.
2 See ante § 204.
3 Gale on E. 124.
4 Winter *v.* Brockwell, 8 East, 308; Liggins *v.* Inge, 7 Bing. 682; ante § 202, a.

by the grantee of the easement, or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material for consideration.[1] Thus, if the owner of ancient lights blocks them up, and the owner of the servient tenement builds on his land, and the former then re-opens his window, to entitle him to recover for the obstruction, he must show that he did not so close them as to lead the other to incur expense under a reasonable belief of abandonment. Unless that is shown, the loss of the easement is irrespective of the duration of the cesser; and from the fact of the cesser the intention to renounce is *primâ facie* presumed; and if such intention is clear, it does not seem essential that the owner of the servient tenement should have done any act on his own land.[2] On the other hand, where the easement is intermittent, as a right of way, a temporary non-user does not operate as an abandonment, nor is a temporary user of another way by reason of its greater convenience, evidence of the abandonment of an immemorial way.[3] So, when a new way has been substituted by agreement for an old prescriptive way, and the new way is stopped, the old right of way revives after any length of time.[4] If a man has a right to the flow of water to his pond, he does not lose it by not using his pond, nor necessarily so because he substitutes a new pond, for the old one.[5] As has been seen, the right to a way of necessity ceases with the existence of such necessity.[6] And it is the same where the easement arises out of

1 Reg. *v.* Chorley, 12 Q. B. 515; Williams *v.* Eyton, 28 L. J. 146 Exch.; Crossley *v.* Lightooler, L. R, 2 Ch. 482; Cooke *v.* Mayor of Bath, id. 6 Eq. 177.

2 Moore *v.* Rawson, 3 B. and C. 332; Stokoe *v.* Singers, 8 E. and B. 39; Gale on E. 482-4.

3 Ward *v.* Ward, 7 Exch. 838.

4 Lovell *v.* Smith, 3 C. B. N. S. 120.

5 Hale *v.* Oldroyd, 14 M. and W. 789.

6 Holmes *v.* Goving, 9 Moore, 180.

a particular purpose which no longer exists, so that the easement cannot be applied to the object for which it was originally granted.[1]

By acts of owner of dominant tenement.

215. If the acts of the owner of the dominant tenement impose an additional burden upon the servient tenement, and this cannot be separated from the original easement, the whole will be lost.[2] Thus where the dominant tenement was a farm, and there was a right of way for all purposes in connection therewith, this will not justify a right of way where the farm is converted into building lots.[3] In the case of a negative easement, such as light or air, it must now be taken as the rule in England after some conflict of decisions, that enlarging ancient lights or opening new ones will not justify building so as to obstruct both, though it is impossible to obstruct what is new without also obstructing what is ancient. It is said that the servitude is not increased by the act, and that to enlarge or open windows is only to exercise a natural right of property.[4] But it may be submitted that to build on one's own land is also only to exercise a natural right of property, and that to enlarge windows must always increase the servitude and may change a slight burden into an intolerable nuisance. So, under a right to send clean water, dirty water must not be sent down the drain, &c., or the whole may be stopped ;[5] and, generally, any non-conformity with restrictive conditions justifies a stoppage of the enjoyment, till the conditions are conformed

1 National G. M. Co. *v.* Donald, 4 H. and N. 8 ; 28 L. J. 185 Exch.

2 Gale on E. 485, 496.

3 Wimbledon *v.* Dixon, 1 Ch. D. 111.

4 Aynsley *v.* Glover, L. R. 10 Ch. 283 ; Tapling *v.* Jones, 11 H. L. C. 290 ; Gale on E. 497.

5 Cawkwell *v.* Russell, 26 L. J. 34 Exch.

to.[1] A mere alteration that imposes no additional burden, as making straight a water course which flowed in a crooked way along a road,[2] or putting in large panes of glass, or clear glass instead of painted glass, without enlarging the window, does not affect the easement.[3] To give a right to obstruct lights, there must have been a substantial alteration in size, or position, or both.[4] A right of eavesdropping is not lost by raising the eaves, where there is no substantial variance in the mode or extent of user of the easement.[5] So an easement to foul water by discharge from a factory is not lost by a change of the materials used, if in fact the pollution caused is not increased.[6] The invasion of privacy by opening new windows is not a legal wrong or injury.[7]

Remedies for obstruction of easements.

216. Every obstruction to the enjoyment of an easement will entitle the plaintiff to recover some damages; it will, in fact, generally be attended with actual damage; but if not, every obstruction may be a damage, as, if unresisted, it would be evidence against the existence of the right;[8] but any the least act may not amount to a legal obstruction; thus, there must be a substantial privation of light or air, not an inappreciable diminution merely.[9] Still the plaintiff is entitled not only to sufficient light for his then business but

1 Cawkwell *v.* Russell, 26 L. J. 34 Exch.

2 Hall *v.* Swift, 6 Scott, 167.

3 Turner *v.* Spooner, 1 Dr. and S. 467.

4 Hutchinson *v.* Copestoke, 8 Jur. N. S. 54; Johnson *v.* Wyatt, 9 Jur. N. S. 1333; but see Aynsley *v.* Glover, L. R. 10 Ch. 283.

5 Harvey *v.* Walters, L. R. 8 C. P. 162.

6 Bexendale *v.* McMurray, L. R. 2 Ch. 790; and 11 H. L. C. 290.

7 Tapling *v.* Jones, 11 Jur. N. S. 309.

8 Nicklin *v.* Williams, 11 Exch. 227.

9 Recent cases are Clarke *v.* Clark, L. R. 1 Ch. 16; Robinson *v.* Whittingham, ibid. 442; and Dent *v.* Auction Co. L. R. 2 Eq. 238; Martin *v.* Headon, ibid. 425; London B. C. *v.* Tennant, L. R. 9 Ch. 213.

to all the light previously enjoyed by him;[1] and that the plaintiff obtains from other sources even more light or air than he had before, may be no defence of a material obstruction by the defendant.[2] Every continuance of an obstruction is a ground for a fresh action till it is removed,[3] but the most effective remedy is a perpetual injunction against such continuing obstruction. When there is a permanent damage to the inheritance, the landlord may have an action, and the damages may be apportioned between him and the tenant.

TORTS TO RIGHTS OF COMMON.

217. Another and very analogous incorporeal right, the invasion of which may be a tort, is the right of common. It is sometimes classed as an easement, but differs in as much as it is a right to take a profit from the soil of another; and, though exercised over real property, the right is not necessarily annexed to other real property, as there may be a common in gross, or a privilege belonging to a person or office.[4] The right may consist in a right to pasture cattle on the land of another, to catch fish in his tanks, to take firewood or timber from his jungle, or ores, lime, brick, earth, &c., from his land; but the instances of the right will vary with the peculiarities of every country.[5] There may be several kinds of common, thus common may be *appendant*, as where the tenant has, by virtue of his tenancy, the liberty to depasture his cattle on the lord's waste, or to cut the firewood he needs from the lord's jungles;

1 Yates *v.* Jack, L. R. 1 Ch. 295; Staight *v.* Burn, id. 5 Ch. 163.

2 Dyers Co. *v.* King, L. R. 9 Eq. 438.

3 Shadwell *v.* Hutchinson, 4 C. and P. 333.

4 Johnson *v.* Barnes, L. R. 7 C. P. 592.

5 The leading case is Tyrringham's case, Tudor's L. C. on R. Pro. 73—94; a recent case is Warrick *v.* Queen's College, L. R. 10 Eq. 105.

or common may be *appurtenant*, as where the liberty is not general, as to all the tenants, but is specially annexed to some particular farm or house, and exists by grant or prescription; or common may be *in gross*, where it does not appertain to land but to persons; or common may be *by reason of vicinage*, as where there is a liberty for one man's cattle to stray from off his own waste and depasture on his neighbour's land, and then it is rather a license to trespass, and the liberty is extinguished by one enclosing his land.[1] The right to take water from a well for domestic purposes is an easement, and not a right to take a profit.[2] The foundation of the right of common is a grant, express or implied, from the owner of the servient tenement; for, though custom or usage may be evidence of the existence of the right, a custom to take a profit out of the property of another must be bad, since it is inconsistent with the idea of property that such a right should be acquired except by grant from the owner.[3] There may be a good custom to use land on a particular occasion, as for a festival.[4] Where every act of user has been by license there is no enjoyment as of right such as to give rise to a custom;[5] but a grant is implied from a prescriptive user, that is, one open, uninterrupted, and of right. So, the extent of enjoyment is limited to what is reasonable,[6] and is needed for use and not for sale, and it must not be destructive of the substance or beneficial use of the servient property.[7] Similarly, the right may be extin-

1 Warrick v. Queen's College, L. R. 10 Eq. 85; Cape v. Scott, L. R. 9 Q. B. 275.

2 Race v. Ward, 4 E. & B. 702.

3 Tudor's L. C. on R. Pro. 89; Bland v. Lipscombe, 4 E. & B. 713(c.)

4 Mounsey v. Ismay, 9 Jur. N. S. 306; ante § 210.

5 Mills v. Colchester, L. R. 2 C. P. 476.

6 Salisbury v. Gladstone, 8 Jur. N. S. 625; Bryant v. Foot, L. R. 1 Q. B. 161; Hall v. Nottingham, 1 Exch. D. 1.

7 Tudor's L. C. on R. Pro. 88-89.

guished by unity of possession, by release, and by some other acts peculiar to the right as inclosure.[1] A temporary or partial change in the condition of the dominant tenement does not extinguish or suspend a right of common appurtenant, but a total change of character probably would.[2]

TORTS TO REALITY BY A LAWFUL POSSESSOR.

218. There may be a tort to real property by one lawfully in possession, and entitled to the use and enjoyment thereof, but who exceeds the limits of his beneficial interest therein, to the detriment of the permanent interests of another having a subsequent, or the ultimate and absolute, estate in the subject-matter. Such is where waste is committed by a tenant for ilfe, or by a tenant for a term of years or other shorter period, or by any other usufructuary with a qualified interest. The duty of the tenant in possession to the remainderman, or reversioner, exists by reason, either of the privity of estate, or of the privity of contract between the parties.[3]

WASTE, different kinds of.

219. Waste may be either *legal*, *equitable*, or *permissive*. *Legal* or legitimate waste includes such acts (as cutting timber, altering buildings, &c.) as the owner of an estate in fee simple, having due regard to his present interest and to the permanent advantage of the estate, might properly commit in a due course of management.[4] *Equitable* or extravagant waste is such as cannot be imputed to any fair acts of ownership, but is destructive of the property itself.[5] Waste is *permissive* when it arises

1 Tudor's L. C. on R. Pro. 93.

2 Carr *v.* Lambert, L. R. 1 Exch. 168.

3 The leading case is Garth *v.* Cotton, 1 L. C. in Eq. 559; see also notes to Lewis Bowles's case, L. C. on R. Pro. 64 to 69; on the remedy by injunction, see Collett on Injns. 68 to 95.

4 *per* Sir J. Romilly, M. R. 22 Beav. 389.

5 Abraham *v.* Bubb, 2 Freem. 54; Turner *v.* Wright, 6 Jur. N. S. 810.

from acts of omission, as neglecting to repair, and so leaving the property to go to ruin. It is thus distinguishable from the other kinds of waste which are active, voluntary, or wilful.

General rules as to commissive waste.

220. Generally, a tenant for life has the bare enjoyment and use of the property, and may not commit even legal waste; and if such waste occurs, as where trees are blown down, or cut down by a trespasser, the property therein belongs to the owner of the first estate of inheritance, and not to the tenant for life.[1] But a tenant for life may, either expressly, or by operation of law, be entitled to legal waste, that is, to the benefit of all fair acts of ownership. Such would be the case with a Hindu holding ancestral or undivided property which he is not entitled to alienate to the damage of his expectant heirs or co-parceners; but which he may otherwise fairly enjoy as a prudent owner might. But such an one must use without abusing the property, and will be liable for, and may be restrained by injunction from, committing acts of extravagant or destructive waste. The rights of a tenant for a term of years, or of any other usufructuary by contract, may be varied by the express terms of the agreement.

221. Generally, therefore, one having the usufruct of real property for life, or for years, is, unless otherwise expressly or by law privileged, entitled only to use the thing for his own benefit and convenience, according to its natural or agreed uses, and to enjoy the produce,—whether natural as the fruit, or legal as the rents,—but so that the

1. Gent *v.* Harrison, 29 L. J. 68 Ch.; 5 Jur. N. S. 1285.

substance of the thing is saved, its nature and form not being changed, and the permanent interests of the proprietor not being invaded.[1]

222. As to permissive waste, it is well settled that a mere tenant at will, or from year to year, is not liable therefor, except by express agreement; that is, he is not bound to make repairs.[2] The duty as to repairs, between landlord and tenant for any length of time, may be affected by well established usage which may form an implied term of the contract between them.[3] But, otherwise the general rule seems to be that a usufructuary for life or for a term of years, is bound to make all ordinary repairs essential to prevent the destruction of the property; but he is not liable to repair extraordinary damages, as by floods, lightning, &c., nor to replace the substance of the thing, his duty being affected by the condition of the property when he took possession, and it being sufficient that he leaves the premises in as good repair as when he received them, saving all reasonable wear and tear.[4]

Rule as to permissive waste.

223. So, a tenant or lessee may not make material changes or alterations, although they may greatly enhance the value of the premises; for the owner has a right to have his houses and lands kept in an unaltered state.[5] He will be liable, therefore, if he stops up any of the windows of a house, or substitutes a

Alterations made by a tenant.

1 Aston *v.* Aston, 1 Ves. 265. See Bowyer's Civil Law, 104, 5; Just. Instit. 1, 2, tit. 4, *de usufructu*.

2 Gibson *v.* Wells, 1 N. R. 290; Woodfalls's L. and T. 464.

3 On this subject the leading case is Wigglesworth *v.* Dallison, 1 Sm. L. C. 43.

4 Chitty's Pr. 386, 7. In Collett on Injns. 78-80, the conflict of authorities on this subject is fully stated.

5 Smyth *v.* Carter, 18. Beav. 78.

new building for an old one;[1] and it is no answer to an action for the infringement of these rights of the landlord or reversioner, to say that the defendant might, before the expiration of the lease, restore the premises to their former plight.[2] So, a mortgagor in possession may be restrained from acts of waste, if the security would thereby be rendered insufficient;[3] and so would a mortgagee in possession unless the proceeds were applied to discharge the mortgage debt.[4]

Fixtures.

224. So, if a tenant or lessee has so fixed any chattel to a house, or so constructed or annexed any building to the land, that it becomes part and parcel of the land, or is not removable without material or permanent damage to the house or freehold, its removal will be waste.[5] But some things not so permanently annexed may be removed, and things which though attached are by law severable, are (with some inaccuracy of language) called *fixtures*, and are variously named, as trade fixtures, tenant fixtures, &c.[6] There is a *primâ facie* inference from the annexion of a chattel to the freehold, that the property therein vests in the landlord or owner.[7] But things slightly annexed for ornament or convenience, and intended as a temporary, and not as a permanent improvement, may be removed, if it can be done without any or considerable damage.[8] So, what is thus annexed for the more convenient carrying on of a trade or occupation, as machinery, &c. may

1 Cole *v.* Green, 1 Lev. 309.

2 Queen's College *v.* Hallett, 14 East, 489.

3 King *v*, Smith, 2 Hare, 243.

4 Farrant *v.* Lovel, 3 Atk. 723.

5 The leading case on fixtures is Elwes *v.* Mawe, 2 Sm. L. C. 128.

6 2 Sm. L. C. 145; Chitty on Cont. 325.

7 Lancaster *v.* Eve, 28 L. J. 235 C. P.; 5 C. B., N. S. 717.

8 Buckland *v.* Butterfield, 2 B. & B. 45; for instances see 2 Sm. L. C. 152.

be removed;[1] and also what is merely accessory thereto (if not of a permanent and substantial nature), as a slight building over an engine.[2] So, if the upper part of a structure is removable at pleasure, merely resting upon a foundation let into the land, the foundation belongs to the landlord, but the rest may be removed; if the upper part was in no way annexed, it would be a mere chattel, and not a fixture, and be recoverable accordingly at any time.[3] The right of the tenant to remove fixtures must be exercised during the tenancy, and not after the term has expired, or he has quitted the premises; unless perhaps the duration of the tenancy was uncertain, and then on its sudden expiration the tenant might remove them within a reasonable time.[4] As between vendor and vendee and mortgagor and mortgagee, the fixtures attached to the freehold, though such as to be removable by a tenant during his term, will pass with it in the absence of any express provision to the contrary in the deed.[5] The rule that renders fixtures irremovable obtains with the most rigor in favor of the heir as against the executor; it is less rigid as between the executor of a tenant for life and a remainderman;[6] while in a case between landlord and tenant there is still more favor shown to the claim to sever and remove.

225. A landlord is taken to contemplate the ordinary

1 Hellawell *v.* Eastwood, 6 Exch. 295; Holland *v.* Hodgson, L. R. 7 C. P. 328.

2 Whitehead *v.* Bennett, 27 L. J. 474 Ch.; Metropolitan A. Co. *v.* Brown, 28 L. J. 581 Ch.

3 2 Sm. L. C. 154; Dean *v.* Allaly, 3 Esp. 11; Wansborough *v.* Maton, 4 A. & E. 884.

4 2 Sm. L. C. 155; Weeton *v.* Woodcock, 7 M. & W. 14; Leader *v.* Homewood, 27 L. J. 316 C. P.

5 Cullwick *v.* Swindell, L. R. 3 Eq. 249; Clinie *v.* Wood, L. R. 3 Exch. 257; Boyd *v.* Sharrock, L. R. 5 Eq. 72; Holland *v.* Hodgson, L. R. 7 C. P. 328.

6 An example is D'Eyncourt *v.* Gregory, L. R. 3 Eq. 382.

Landlord's risk as to fire.

risks of house property from fire and the negligence of servants, and if the premises are destroyed by fire, without any gross or culpable negligence on the part of the tenant, it is, in contemplation of law, no more than permissive waste, and for this a tenant at will or from year to year is not responsible, and the landlord will have no remedy for the loss.[1] He might have insured, or taken a covenant from his tenant. But if the fire was caused by such an amount of gross negligence that it was wilful and not merely accidental, the tenant will be liable as a stranger would be.[2]

Right of entry toinspect.

226. A landlord or reversioner has a right to enter upon land or premises to see if waste is being done, and if the lessee prevents the inspection, substantial damages may be recovered for the infringement of the right, though no waste has been actually committed, or damage done.[3]

TORT FROM WANT OF SKILL.

227. Lastly, there may be a tort to real property by a breach of duty arising out of a contract, by reason of negligence in performing the contract. It is the duty of every workman who undertakes the performance of work, to execute it with care and diligence, and with the ordinary amount of skill and knowledge incident to his particular craft, art, or profession.[4] If a carpenter or builder undertakes to roof or build a house, and uses such bad materials, or does his work so negligently and

1 Torriano *v.* Young, 6 C. & P. 8.
2 Filliter *v.* Phippard, 11 Q. B. 347; Woodfall's L. & T. 491.
3 Hunt *v.* Downman, Cro. Jac. 478; this case has been doubted (Woodfall's L. & T. 487); but it is not overruled, and it seems reasonable law; see Makin *v.* Watkinson, L. R. 6 Exch. 25.
4 Harman *v.* Cornelius, 28 L. J. 85 C. P.

unskilfully, that the roof is not water tight, or the building gets out of the perpendicular, or is dangerous or useless, he will be responsible in damages for negligence.[1]

1 Broom *v.* Davis, 7 East, 479 (n.); Farnsworth *v.* Garrard, 1 Camp. 39.

SECTION II.

TORTS TO PERSONAL PROPERTY.

Torts to personal property—how classed.

228. The last division of torts in respect to their objects, consists of torts to personal property. These may be classed in respect to their nature, according as the tort constitutes the invasion of a general right, or the breach of a public, or a private duty. There will generally, but there need not in all cases, be some tangible article of personal property which is made the object of the tort, but the injury may consist in the invasion of some right, or the breach of some duty, resulting in a pecuniary loss to the plaintiff. But these torts are very distinguishable from those treated of in Chapter II; the damages to be given will not represent a compensation for loss or suffering in person or reputation, but are intended to save the plaintiff from being out of pocket by the wrong of the defendant; though, of course, insult, malice, &c. accompanying the tort, may justify an award of more than the bare loss of money suffered. Thus, A may have a right to the use of a trade-mark; or if he has made a contract with B, or stands in a particular relation to B, he has a right against all others, that they should not interfere to prevent or seduce B from performing his lawful contract or duty towards A, to his loss and damage. The invasion of such general rights is a tort to A in respect of his rights of personal property. So, if B has made a contract with A, and used deceit to the loss and damage of A, this is a similar tort by the breach of a private duty arising out of a contract. It seems, therefore, right, or at least is more con-

venient, to class such wrongs with torts to personal property, though the injury is not inflicted upon any corporeal object of personal property.

229. In the language of the Penal Code, a mark used for denoting that goods have been made or manufactured by a particular person, or at a particular time or place, or that they are of a particular quality, is called a trade-mark.[1] It has been disputed whether it is accurate to say that there is no property in a trade-mark; at most such a right of property is only to the exclusive use of the mark when applied to a particular kind of article, and if another applied the same mark to a different kind of article, it is not an infringement.[2] The injury arises where the plaintiff has, by the appropriation of a particular mark, fixed in the market where his goods are sold, a conviction that the goods so marked were manufactured by him, and the defendant, by the use of similar marks, induces the public to purchase his goods in the belief that they are those of the plaintiff.[3]

TRADE-MARKS.

230. Hence, an exact resemblance is not necessary,[4] but the questions in an action are, is the resemblance such as to deceive ordinary persons? Was the mark adopted by the defendant with that intent, and in order to supplant the plaintiff's goods? Were the goods in fact sold as the plaintiff's goods? If these are found in the affirmative, no special damage need be

What is a tort to such.

1 P. C. s. 478.

2 Collins Co. *v.* Brown, 3 K. & J. 423; but see Leather Co. *v.* American L. Co. 10 Jur. N. S. 81; S. C. in dom. proc. 11 Jur. N. S. 513.

3 The leading case on trade-marks is Croft *v.* Day, Tudor's L. C. in Merc. & M. Law, 482. On the remedy by injunction, see Collett on Injns. 139—156.

4 Croft *v.* Day, supra, Edelston *v.* Edelston, 9 Jur. N. S. 479; Leixo *v.* Pevezende, L. R. 1 Ch. 192.

proved.[1] It is sufficiently a sale of the goods as being of plaintiff's manufacture, if they are sold by the defendant to dealers to be retailed by them as such, though the dealers knew the truth.[2]

231. Hence also, there can be no action where the mark, name, or style, has never been put forth to the world by the party complaining of the misuser of it;[3] nor where the defendant merely represents that he sells, not the plaintiff's goods, but others of as good a quality;[4] nor where the defendant is otherwise entitled to use the name or mark, and does so without any misrepresentation, such as to induce others to suppose that his business or goods are the same as those of the plaintiff.[5] On the other hand, if there is an actual similarity sufficient to mislead the public, and the public is misled to the damage of the plaintiff, he may have an action, though the misuser was without any fraudulent intention;[6] and, even without such damage, the plaintiff will be entitled to a perpetual injunction, the appropriate remedy, in addition to any damages, in all actions for these torts.[7]

232. A trade-mark may be in a variety of forms. Thus, it may be in the shape of a label or wrapper applied to the bottle or packet in which the article is put.[8] On the same principle the use by the defendant of a similar title to a newspaper or almanac, &c. to

Forms of a trade-mark.

1 Rodgers *v.* Nowill, 5 C. B. 109; Crowshay *v.* Thompson, 4 M. & G. 357.

2 Sykes *v.* Sykes, 3 B. & C. 541.

3 Lawson *v.* Bank of London, 18 C. B. 93.

4 Canham *v.* Jones, 2 V. & B. 218.

5 Burgess *v.* Burgess, 3 D. M. and G. 196; Singer *v.* Wilson, 2 Ch. D. 434.

6 Millington *v.* Fox, 3 M. and Cr. 338.

7 Cartier *v.* Carlile, 31 Beav. 292; 8 Jur. N. S. 183; Edelston *v.* E. 9 Jur. N. S. 479.

8 Shrimpton *v.* Laigh, 18 Beav. 164; Ainsworth *v.* Walmsley, L. R. 1 Eq. 518.

that sold (not being a title merely advertised and not yet used)[1] by the plaintiff with a view to mislead the public;[2] the use of a similar name for an hotel for a like purpose;[3] the use of a similar name or style for a shop or firm of merchants, may be restrained by injunction, and damages may be awarded for any loss occasioned by the wrong.[4] It is immaterial that the persons constituting the firm have changed; and if a trade-mark is used to indicate the place where goods are made, it may be sold along with the manufactory; but if the value of the goods depends upon the personal skill of the adopter of the mark, he cannot give a right to others to put his mark upon goods made by them, as that would be a fraud.[5] Hence, if one man has sold to another the good-will of his shop, though he may not have agreed to abstain from the trade in future, he will be restrained from so carrying on the business as to induce the public to believe that he is continuing the business of the same shop or firm as he was concerned in before.[6]

When a plaintiff may sue.

233. To entitle a plaintiff to the benefit of an injunction, he must not himself have been guilty of fraudulent representations to the public regarding the quality of his own goods; otherwise, as he does not come into Court with clean hands, he will be entitled to no relief;[7] and it is immaterial that the misrepresentation is so gross and palpable, that no one is likely to be deceived

1 Maxwell *v.* Hogg, L. R. 2 Ch. 307.

2 Spottiswoode *v.* Clark, 2 Ph. 154; Clement *v.* Maddick, 33 L. T. 117 Ch.

3 Howard *v.* Henriques, 3 Sandf. 725, (American case); and see 2 St. Eq. Jur. 951 (n.); 2 Hilliard, 68.

4 Lewis *v.* Langdon, 7 Sim. 421; Hookham *v.* Pottage, L. R. 8 Ch. 91.

5 Leather C. Co. *v.* American L. C. Co. 11 Jur. N. S. 513; Hall *v.* L. Barrows, 10 Jur. N. S. 55.

6 Crutwell *v.* Lye, 17 Ves. 335; Charton *v.* Douglas, 28 L. J. 841 Ch.

7 Pidding *v.* How, 8 Sim. 477; Edelston *v.* Vick, 11 Hare, 78.

by it.[1] The mere making and selling of labels or other trade-marks, so that others may buy and use them to the fraud and damage of the plaintiff, may also be restrained.[2] But the so making and selling of labels, &c. does not constitute forgery.[3] As to criminal liability in respect to the use of trade-marks, the Penal Code must be consulted.[4]

TORTS TO COPY-RIGHT.

234. By Act 20 of 1847, the authors or publishers of books or articles in periodicals are entitled to the copyright, or exclusive privilege of printing and selling copies thereof, during limited periods, and the invasion of such a right may be restrained by injunction, and damages may be also awarded. This is a right existing only by express enactment, and not at common law.[5] A *bonâ fide* abridgment, or the *bonâ fide* use of the same common materials in the composition of another book, is not an invasion of copyright.[6] But abridgments are not favored, and whether an abridgment is a piracy or not, depends not only upon the quantity, but the value of the matter extracted; and if the result is, in effect, to substitute the one work for the other, it is a piracy:[7] the point where a damage and consequent injury may be perceived, varies in each case, and cannot be definitely stated.[8] The editor of legal reports has certainly a copyright in his own marginal notes.[9] In America it is held that there can be no copy-

1 Leather C. Co. *v.* American L. C. Co. 10 Jur. N. S. 81.

2 Farina *v.* Silverclock, 1 K. & J. 509; 6 D. M. & G. 214; 4 K. & J. 650.

3 Reg. *v.* Smith, 27 L. J. 225 M. C.

4 P. C. s. 478 to 489.

5 Donaldson *v.* Becket, 7 Bro. P. C. 88; Read *v.* Conquest, 7. Jur. N. S. 265.

6 2 St. Eq. Jur. 939; Wilkins *v.* Aikin, 17 Ves. 426.

7 Saunders *v.* Smith, 3 M. & C. 711; Bohn *v.* Bogue, 10 Jur. 520; Chatterton *v.* Cave, L. R. 10 C. P. 572.

8 2 Kent's Com. 486.

9 Sweet *v.* Binning, 24 L. J. 176 C. P.; 2 Kent's Com. 485 (n.)

right in the written judgments delivered by a Court.[1] It seems to be otherwise in England;[2] but any number of persons may take down, or obtain copies of judgments, and publish them without copying from each other. So, generally, all may use the same common materials, but one man may not steal the arrangement and combination of materials used by another, nor save himself trouble and expense by simply copying the other's matter; the one book need not be a copy of the other, it is enough if it is a servile or evasive imitation of the plaintiff's book.[3] This rule is often applied to such compilations as directories, dictionaries and guide books.[4] Part of one book may be a piracy of another, and the publication of such part, or of the whole, where the part is not separable, will be restrained.[5] There may be a piracy of the illustrations to a book where they are a substantial part of it, or of a book of designs or illustrated catalogue.[6] There may be a copyright in a translation whether made by, or given to, the person publishing it.[7] But the author of a book clearly immoral, libellous, or seditious, is not entitled to any relief.[8] It seems that unless expressly provided otherwise, the grant of the copyright of one edition does not preclude the author from publishing a fresh edition before the first is all sold.[9]

TORTS TO PATENT RIGHTS.

235. So, the patent law (Act 15 of 1859) has conferred upon inventors the right to the exclusive use of inventions during certain periods.

1 Kent's Com. 477 (n.)

2 Saunders *v.* Smith, supra.

3 Emerson *v.* Davies, 3 Story R. 768, an American case, the most valuable decision on the subject. For cases of injunctions to protect copyright, see Collett on Injns. 116—130.

4 Kelly *v.* Morris, L. R. 1 Eq. 697; Scott *v.* Stanford, L. R. 3 Eq. 718.

5 Mawman *v.* Tegg, 2 Russ. 385.

6 Bradbury *v.* Hotten, L. R. 8 Exch. 1; Grace *v.* Newman, L. R. 19 Eq. 623.

7 Wyatt *v.* Barnard, 3 V. & B. 77.

8 Walcot *v.* Walker, 7 Ves. 2; Southey *v.* Sherwood, 2 Mer. 435.

9 Warne *v.* Routledge, L. R. 18 Eq. 497.

It is, therefore, a tort, (to be prevented by an injunction, and compensated for by damages), for another to counterfeit, imitate or resemble the invention, or to make use of the principle thereof, without the leave and license of the owner of the patent.[1] Some of the provisions of the Act are peculiar; as s. 23 which limits the defence that may be set up to an action for the invasion of a patent right; while s. 24 contains provisions by which a person may call in question the validity of a patent.

PUBLICATION OF MSS., LETTERS, &c. may be a tort.

236. Though copyright, properly so called, or the sole and exclusive liberty of printing or otherwise multiplying copies of any work of literature, or art, or science, does not exist at common law, but only by express enactment;[2] yet the author of such unpublished works is entitled, upon the common law right of property, to keep them unpublished for his own private use and pleasure alone, or to communicate at will the knowledge thereof to others.[3] Hence the publication of manuscripts, or notes of lectures or of discourses, may be prevented.[4] So, also the publication of private letters may be prevented, since the sender of a letter does not, thereby, give the receiver a right to publish it, but, beyond the purposes for which the letter was sent, the property therein remains in the sender.[5] This does not extend to justify the receiver in refusing to produce them in a Court of Justice, though the sender forbids him to do so.[6] It

1 As to the remedy by injunction in these cases, see Collett on Injns. 134-7.

2 Reade *v.* Conquest, 7 Jur. N. S. 295.

3 Queensberry *v.* Shebbeare, 2 Eden, 329; Prince Albert *v.* Strange, 1 M. and G. 25.

4 Abernethy *v.* Hutchinson, 3 L. J. 209 Ch.

5 Pope *v.* Curl, 2 Atk. 341; Gee *v.* Pritchard, 2 Swans. 402. As to the rights of the receiver, see infra § 262.

6 Hopkinson *v.* Burghley, L. R. 2 Ch. 447.

seems to be no excuse that the publication is for the purpose of vindicating character;[1] unless, perhaps, the vindication is justified by the false imputations of the writer of the letters.[2] This does not extend to official letters which the State may cause to be published.[3]

237. There is another class of torts, consisting of an invasion of a right and resulting in detriment to personal property, in which the plaintiff may be entitled to the protection of an injunction, and to compensation by damages. Such are cases, in which the defendant seeks to turn to his own profit the reputation acquired by the plaintiff in literature, science, or business, by falsely fathering upon him what is not, in truth, his production; while, at the same time, it is neither a mere piracy nor copy of any specific composition or production of the plaintiff, nor is it intended to be a counterfeit or colorable imitation of any other specific similar thing, which the plaintiff has composed or produced, or does compose or produce, or in which he is interested or concerned.[4] Such as where a defendant pretends that a book he sells, is the production of a well known author, when it is not;[5] or when the name of a man of credit and property is falsely published as being a director, &c., of a company.[6] But the ground of interference in such cases is, that some appreciable mischief is being done to property by the fraudulent misuse of the name of another.[7]

USING ANOTHER'S NAME when a tort.

1 Gee v. Pritchard, supra; 2 St. Eq. Jur. 948.

2 Percival v. Phipps, 2 V. and B. 19.

3 Folsom v. Marsh, 3 Story R. 103. As to injunctions in such cases, see Collett on Injns. 130-4.

4 As to injunctions in such cases, see Collett on Injns. 137-9.

5 Byron v. Johnson, 2 Mer. 29.

6 Routh v. Webster, 10 Beav. 561.

7 Clarke v. Freeman, 11 Beav. 112.

INVASION OF RELATIVE PERSONAL RIGHTS.

238. Invasions of what are called relative personal rights, are torts to general rights indirectly causing damage to personal property, by causing a pecuniary loss; except in the case of the right to the custody of a minor, and there the object of the tort is really in the position of a thing or chattel.

Procuring a breach of contract.

Thus, where A causes damage or loss to B by maliciously procuring C to break his contract with B,[1] or by interfering between an employer and a workman to prevent the latter from completing work he has undertaken to perform,[2] or by procuring the non-delivery of goods according to contract,[3] substantial damages are recoverable. So, if one knowingly and designedly interrupts the relation of master and servant, by procuring the servant to depart, or by keeping him as a servant, whereby the master suffers loss, he is liable in damages.[4] From the relationship of parent and child, a duty of service by the latter is presumed; and an action will lie for enticing away the plaintiff's daughter, though it is not alleged that defendant debauched her, or there was a binding contract of service between her and plaintiff.[5] So also, if a tort to the servant, as a battery, results in damage to the master by the loss of his services, the master also may have an action against the wrongdoer;[6] but not, it is said, when the servant is killed at once by the injury.[7] But this is only where the loss is from a pure wrong committed on the servant, and not from

1 Lumley *v.* Gye, 2 E. and B. 216; see pp. 226, 227, 236, 237 and 247.

2 Blake *v.* Lanyon, 6 T. R. 221; Hart *v.* Aldridge, 1 Cowp. 54.

3 Green *v.* Button, 2 C. M. and R. 707.

4 Lumley *v.* Gye, 2 E. and B. 224.

5 Evans *v.* Walton, L. R. 2 C. P. 615.

6 Russell *v.* Corne, 2 Ld. Raym. 1031; and see 2 Hilliard, 484.

7 Osborn *v.* Gillett, L. R. 8 Exch 88.

a wrong arising out of a breach of contract between the servant and defendant, as a breach of a contract to carry safely.[1] The measure of damages is not the mere loss of services, but ample compensation for all the damage resulting from the wrongful act may be given.[2]

In cases of seduction or adultery.

239. By the English law, a man may have an action against another who has seduced his daughter, or other female relation, or even servant, provided she in consequence became pregnant, and was residing with, and rendering some service, however slight,[3] to the plaintiff at the time; the foundation of the action being, not the wrong to the woman, but the absurd notion of a loss of service and damage to the plaintiff. In India it would probably be held, that in the Mofussil, there is no civil remedy for such seduction. The English law provides special remedies for adultery.[4] By the Hindu and Mohammedan laws it was a criminal offence in both parties, and there was no civil remedy;[5] and by the Penal Code, the adulterer alone is now liable criminally.[6] In the late Supreme Courts a civil action for criminal conversation has been maintained though the parties were Hindus.[7] There appeared to have been some actions maintained in the late Sudder Courts, for loss arising from the abduction or enticing away of a wife, or for special damage consequent upon adultery as loss of marriage expenses;[8]

1 Alton *v.* Midland Ry. Co. 11 Jur. N. S. 672.

2 Gunter *v.* Astor, 4 Moore, 12.

3 Terry *v.* Hutchinson, L. R. 3 Q. B. 599.

4 The form of action used to be trespass *vi et armis (!)*. The present remedy is under the Divorce Acts.

5 1 Str. H. L. 46; 2 Id. 40-44; 2 Hamilton's Hedaya, 2 *et seq.*

6 P. C. s. 497.

7 1 Morley's Dig. 115.

8 1 Ibid. 288; Macpherson, C. Pro. 35, 42.

and a similar case of an action for persuading the wife to remain apart from her husband has occurred in England;[1] but such actions are distinguishable from those in which the gist of the action is the fact of adultery or seduction. In actions for seduction the loss of service is a mere pretext for punishing immorality;[2] a parent can have no civil right in the chastity of his daughter, and the daughter having consented to her loss, is not injured. Adultery is a breach by the wife of her contract with her husband; and the adulterer has procured the breach; but to be actionable, the procuring a breach of contract should be attended with special damage;[3] and the civil remedy, if any, ought, it would seem, to be limited accordingly. On other grounds, adultery and seduction might rightly be treated as offences.[4]

Right to the custody of minors.

239, *a*. The right of a father or other legal guardian to the custody of a minor is a civil right good against all others, the minor, the subject of such right, being in the position of a *thing* (just as much as a slave or a horse) in respect to it;[5] and the invasion of the right is therefore a legal injury which must import damage though there be no actual loss. As between the father and mother of a legitimate child, the general rule is that the father has the right to the custody however young the child may be.[6] After his death, or upon his being transported, the mother has the like right.[7] Ante-nuptial agreements as to the religion in which the children are to be brought up

1 Winsmore *v.* Greenbank, Willes, 577; see Evans *v.* Walton, L. R. 2 C. P. 622.

2 Irwin *v.* Dearman, 11 East. 23.

3 Lumley *v.* Gye, 2 E. & B. 216.

4 Seduction is a misdemeanour in some States of America; 2 Kent's Com. 222 (n.)

5 2 Austin's Jur. 49; 2 E. & B. 257.

6 Rex *v.* Greenhill, 4 Ad. & E. 624.

7 *In re* Race, 26 L. J. 169 Q. B.; *Exp.* Bailey, 6 Dowl. P. C. 311.

are not binding.[1] Of an illegitimate child the mother alone has the right to the custody.[2] By English law up to the age of 14 certainly, and as to girls (it seems) up to the age of 16, the wishes of the child are not to be considered in determining the custody.[3] The result of the cases in India seems to be that up to the age of 16, a Hindu father has a right to the custody of his child without regard to the child's wishes; and a parent has a right to direct the education, and choose the religion of such a child.[4] Generally, a Hindu husband would seem entitled to the custody of his minor wife after puberty and up to the age of majority; but not probably, if after the marriage he has become a convert or outcast, as the relation is founded on contract. After majority a wife's refusal to cohabit might be a breach of contract, but it may be doubted, if our Courts would afford any remedy equivalent to a suit for the restitution of conjugal rights.[5]

The interests of minor are to be considered.

239, *b*. But, a minor will not be delivered to the custody of the person otherwise entitled thereto, if the minor would be exposed to ill-usage or moral contamination.[6] And a parent or legal guardian may lose his right by allowing another to bring up his child, and then, if the prospects in life of the child would thereby be seriously injured, the custody will not be given

1 Andrews *v.* Salt, L. R. 8 Ch. 622.

2 Rex *v.* Soper, 5 T. R. 278.

3 *In re* Race, supra; Reg. *v.* Howes, 30 L. J. 47 M. C.; *In re* Newberry L. R. 1 Ch. 263; Mallinson *v.* Mallinson, L. R. 1 P. & D. 221; *In re* Andrews, L. R. 8 Q. B. 153.

4 See the cases in Mayne's P. Code (4th ed.) 231; and the cases cited in the judgment *in re* Race. See 2 Kent's Com. 218 (c.)

5 Macpherson's C. Pro. 42; 2 Morley's Dig. 335 was a very special case; and see 6 Moore I. A. C. 348; but see a case reported 8 Calc. W. R. 3 Privy Council.

6 *In re* Race, supra; Anon, 2 Sim. N. S. 54.

even to a father.[1] The rights of a father are qualified in certain cases by statute in England.[2] Where the morals, or safety, or interests of children strongly require it, their rights may be actively protected by withdrawing them from the custody of a parent or guardian otherwise entitled thereto.[3] Act 9 of 1861 provides a speedy procedure for determining the custody of minors, but does not preclude a regular suit; some cases may fall within the Penal Code.[4] Though a child is in the position of a *thing* in respect to the invasion by a third person of the guardian's right of custody, the child is a *person* in relation to its parent or guardian, and has rights, and owes duties which necessarily are regarded in fixing its custody.[5]

240. The next class of torts to be considered, is where the injury is done in respect to a specific object of personal property, by the invasion of a man's general rights of property in, or possession and enjoyment of, his goods; such are trespasses upon personalty, and the conversion of chattels. The distinction between trespass and conversion is a good deal technical; trespass is where force, actual or implied, is used, and constitutes the injury; to damage or meddle with the chattel of another, but without intending to exercise an adverse dominion over it, is a trespass, and not a conversion; but though trespass may be by damaging the goods, it may also include, or consist of, the taking of them.[6] A conversion may be said to mean a breach, made adversely, in the con-

TRESPASS AND CONVERSION.

1 Lyons *v.* Blenkin, Jac. 245; Andrews *v.* Salt, L. R. 8 Ch. 622.

2 2 & 3 Vict. c. 54, and the Divorce Acts.

3 Wellesley *v.* Beaufort, 2 Russ. 1; Warde *v.* Warde, 2 Ph. 786.

4 See ss. 361 to 374.

5 2 Austin's Jur. 48 *et seq.*

6 Heald *v.* Carey, 11 C. B. 993.

tinuity of the owner's dominion over his goods, though the goods may not be hurt.[1] The gist of the action in trespass is the force and direct damage inflicted; in conversion, it is the deprivation of the use.[2] In these cases the tort may be whilst the property is either in, or out of, the actual possession of the owner. As against a wrongdoer, any possession is sufficient to enable the plaintiff to sue, even though his possession, as against the owner, is wrongful.[3] Where the possession is derived from the owner, as in bailments, either the owner, or the bailee, or both, may, in some cases, have an action;[4] but where the injury consists only in the deprivation of the use, and the owner has not a right to the immediate possession, as where he has let the goods for a term to a hirer, he cannot sue for the conversion.[5] But though the property in, and possession of, goods may thus be separated, the property in goods cannot be in abeyance any more than the fee in land;[6] and while the right of property in a chattel is in one person, the right of possession cannot be absolutely and adversely in another.[7] With these general remarks, torts to personal property by third persons will be distinguished from torts by bailees (to be noticed hereafter,) when the injury consists in the breach of a private duty arising out of the contract of bailment.

Action for trespass.

241. In an action for trespass to personal property, any possession is sufficient property as against a third person who has no title at all;[8] and,

1 Chinnery v. Viall, H. and N. 288.
2 Broom's Com. 807.
3 Armory v. Delamirie, 1 Sm. L. C. 256; Bourne v. Fostbrooke, 11 Jur. N. S. 202.
4 Reg. v. Vincent, 21 L. J. 109 M. C. and see Story on Bailm. 194; Broom's Com. 837.
5 Gordon v. Harper, 7 T. R. 9.
6 Legge v. Boyd, 1 C. B. 112.
7 Clerk v. Adam, 1 Cl. and F. 242.
8 Elliott v. Kemp, 7 M. and W. 312.

therefore, a mere wrongdoer cannot set up the title of the real owner under a plea denying the plaintiff's property, unless he could justify under the authority of the third party.[1] And property is sufficient without possession, for the right of property draws to it the possession.[2] Hence, an executor, after probate granted, may have an action for a prior trespass.[3] And the vendee of goods, when the property passes, may also bring an action though he never had possession.[4] The possessory interest of a gratuitous bailee of a chattel, as a depositary, is sufficient for him to maintain an action against a wrongdoer.[5] But the general owner, in virtue of his general ownership and right of possession, may also maintain a suit against a stranger, for a trespass on it, or conversion of it, provided he thereby sustained any damage.[6] Indeed, it is a general rule, that either the bailer or bailee may, in such a case, maintain a suit for redress; and a recovery of damages by either of them will be a full satisfaction, and may be pleaded in bar of any subsequent suit by the other.[7] There is no absolute property in wild animals or game, fit for food or otherwise profitable, until reclaimed or captured. As long as such an animal remains on a man's land, he has a qualified interest which is lost when it leaves the land, though it be hunted off it. But if a man trespasses on the land of another, and there captures such an animal, the property at once vests in the owner of the land, who may take it.[8] Generally, dogs

1 Jefferies *v.* G. W. Ry. Co. 5 E. and B. 802.

2 Balme *v.* Hutton, 9 Bing. 471.

3 Smith *v.* Mills, 1 T. R. 480.

4 Thomas *v.* Phillips, 7 C. & P. 573.

5 Routh *v.* Wilson, 1 B. & Ald. 59.

6 Broom's Com. 837; Story on Bailm. 94; Tancred *v.* Allgood, 28 L. J. 362 Exch.

7 Story on Bailm. 94.

8 Blades *v.* Higgs, 11 Jur. N. S. 701.

trespassing in pursuit of wild animals cannot lawfully be destroyed.[1]

Defences to an action.

242. A master or principal is liable for the trespass of his servant or agent where the act is one done in the course of his duty. The subject of the use of force in defence of goods has been noticed in § 36. A defendant may justify a trespass by showing that the possession of the plaintiff was, as against defendant one fraudulently obtained.[2] So, in trespass for destroying a picture, the defendant may show that it was a scandalous libel; and the plaintiff, if indeed he be entitled to recover at all, shall only recover the value of the canvas and paint.[3] But if the plaintiff's conduct, though unfair, was not illegal, this will not justify a wrong done in revenge.[4] So, a defendant may justify by pleading that the act was necessary and done at the time; as that the chattels were wrongfully upon the defendant's land and doing damage there to the defendant, and that they were removed, doing no damage to them that could be reasonably avoided;[5] or that the plaintiff's dog was worrying his sheep, and that he could not otherwise stop it, or protect his sheep;[6] but if defendant's sheep, &c., had strayed on plaintiff's land, and then the dog attacked them, the defendant cannot justify shooting the dog in their defence.[7] Or it may be pleaded that the removal or other interference with the goods was done *bonâ fide* for their preservation, and was reasonably necessary; but a mere voluntary and capricious interference

1 Vere *v.* Cawder, 11 East, 569.

2 Ashby *v.* Minnitt, 8 A. & E. 121.

3 DuBost *v.* Beresford, 2 Camp. 511; Fores *v.* Johnes, 4 Esp. 97.

4 Ibbotson *v.* Peat, 11 Jur. N. S. 394.

5 Rea *v.* Sheward, 2 M. & W. 426.

6 Janson *v.* Brown, 1 Camp. 41; 1 Hilliard, 155, 645.

7 Addison, 314.

will not excuse.[1] A vendor who retakes goods sold by him to the plaintiff, is liable to the full value, and cannot reduce damages by setting off the unpaid price.[2]

Action for conversion or detention.

243. In an action for the conversion or detention of goods, the plaintiff has to prove, 1, a general or special property in the goods; or, as against a wrongdoer, a possession of them; 2, an actual or constructive possession or right of possession; and, 3, a wrongful conversion or detention by the defendant; besides further the value or damage.[3]

General property.

244. Where there is both a general and a special owner, but the general owner has not transferred his right to the possession, he may still maintain an action for a conversion by a stranger; thus, if he delivers goods to a carrier or bailee, he still has possession in law, as against a wrongdoer, and the bailee is only his servant.[4] Property in the possession of very young children is in the constructive possession of the father, but not a watch, &c., given to a lad of sixteen.[5] If a bailee for a special purpose transfers the goods to another, in contravention of that purpose, the general owner may sue the transferee, though a *bonâ fide* vendee; unless in England the goods have been sold in market overt, or in India the case falls within Excep. 1, s. 108 of the Indian Contract Act.[6]

Special property.

245. It is sufficient for the plaintiff to prove that he has a special property in the goods converted, as against the defendant; thus a

1 Kirk *v.* Gregory, 1 Exch. D. 55.
2 Gillard *v.* Brittan, 8 M. and W. 575.
3 Roscoe Ev. at N. P. 604.
4 Routh *v.* Wilson, 1 B. and Ald. 59.
5 Hunter *v.* Westbrook, 2 C. and P. 578.
6. Wilkinson *v.* King, 2 Camp. 335.

bailee,[1] or an officer who has taken goods in execution,[2] may maintain this action; and, in some cases, though the plaintiff has never had actual possession; thus, a factor to whom goods have been consigned, but by whom they have never been received, may sue for a conversion of them.[3] Special property may be sufficient to support an action even against the owner of the goods.[4] So, where the action is brought against a mere wrongdoer, it will be sufficient for the plaintiff to show that he was in possession of the property;[5] thus, the finder of property is entitled to keep it against all but the rightful owner, and may sue for a conversion;[6] so the owner of a ship, when the cargo is put on board, is *primâ facie* owner of the cargo, so as to sue a wrongdoer for trespass or conversion.[7] In order to recover in an action for conversion, the plaintiff must show that he has a right to the immediate possession of the goods, the gist of the action being the deprivation of the use, and the exercise of dominion over the property.[8] Hence the purchaser of goods in the possession of the vendor subject to his lien for the price, cannot maintain this action against a wrongdoer.[9]

Right to possession essential.

246. The right of action may depend upon whether a sale, or other transfer, has vested the property in the transferee. Where goods are sold, and nothing is said as to delivery or payment, and everything the seller has to do with them is complete, the property

Property—vesting thereof.

1 Nicholls *v.* Bastard, 2 C. M. and R. 659.
2 B. N. P. 33.
3 Fowler *v.* Down, 1 B. and P. 47.
4 Roberts *v.* Wyatt, 2 Taunt. 268.
5 Jeffries *v.* G. W. Ry. Co. 5 E. and.B. 802.
6 Armory *v.* Dalamirie, 1 Sm. L. C. 256.
7 Banker *v.* Molyneux, 3 M. and G. 84.
8 Bloxam *v.* Sanders, 4 B. C. 941.
9 Lord *v.* Price, L. R. 9 Exch. 54.

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vests in the buyer, and the seller is liable to deliver them, whenever demanded, upon payment of the price; but the buyer has no right to have possession till he pays the price.[1] If sold upon credit, and nothing is said as to delivery, the right of possession and also of property vests at once in the buyer, subject to the right of possession being defeated by his becoming insolvent before he obtains possession.[2] But goods may be so shipped as to show an intention of the consignor that the property should not vest in the consignee until some further act is done by him, as the acceptance of a bill for their value.[3] Where goods are sold in bulk, no property in any particular goods passes, till they have been separated, weighed, or otherwise ascertained, and their appropriation thus assented to by both parties.[4] Where A is indebted to C, and B to A, and it is agreed between them that B shall deliver goods to C in satisfaction of A's debt, and B converts them to his own use, C may maintain an action for the conversion, though he never had possession; for, by the agreement, the right is in him.[5]

247. In general, where goods are ordered to be made, so long as the order is not executed, but only in course of execution, no property passes to the person for whom they are to be made.[6] But it is a question of intention to be inferred from the circumstances thus, if advances are made from time to time, or materials are selected or furnished for the work, the property may pass to the buyer.[7] So if the goods are

1 Bloxam *v.* Sanders, supra; Tarling *v.* Baxter, 6 B. and C. 360; ss. 78 and 95 I. C. Act.

2 Ibid; s. 78 ill. (*d*) and s. 96 I. C. Act.

3 Shepherd *v.* Harrison, L. R. 4 Q. B. 196.

4 Hanson *v.* Meyer, L. C. on Merc. Law, 505; Jenner *v.* Smith, L. R. 4 C. P. 270; s. 82 I. C. Act.

5 B. N. P. 35.

6 Mucklow *v.* Mangles, 1 Taunt. 218; s. 79 I. C. Act.

7 Wood *v.* Bell, 5 E. & B. 772; 6 E. & B. 355.

ascertained and pointed out though not finished, it is a question of intention, which should be apparent on the contract, whether the property in them passes at the time of sale or not till they are completed.[1] By a gift of goods the property does not pass without an actual delivery, or unless (under English law) the gift be by a deed.[2] But if A in L gives B his goods at Y, and another takes them away before B obtains actual possession, B may, it is said, sue for the conversion of, or trespass on them.[3] If license is given to take possession of after acquired property, the property passes on possession being taken.[4]

Sales in market overt.

248. By English law whoever buys goods in the open, public, and legally constituted market, acquires an indefeasible title, unless he buys with notice of a defect of title.[5] Otherwise, a buyer acquires no better title than that of his immediate seller; stolen property sold out of market overt may be recovered, though the buyer bought in good faith for value and without notice, and without showing a conviction or prosecution of the thief;[6] and the owner may retake such property whereever he can find it, if he can do so without a breach of the peace.[7] So, if a servant without authority sells goods out of market overt, the buyer will be guilty of conversion, if he refuses to deliver them up on the demand of the master.[8] In the ordinary case of a sale of goods in a shop there is an implied warranty by the seller that he has a good

1 Young *v.* Mathews, L. R. 2 C.P. 127; s. 80 I. C. Act.

2 Irons *v.* Smalpiece, 2 B & Ald. 551.

3 2 Selw. N. P. 1300; Br. Ab. Trespass, 303.

4 Hope *v.* Hayley, 5 E. & B. 830.

5 Harwood *v.* Smith, 2 T. R. 750.

6 White *v.* Spettigue, 13 M. & W. 603.

7 Antony *v.* Haneys, 8 Bing. 192; Blades *v.* Higgs, 7 Jur. N. S. 1289.

8 Metcalfe *v.* Lumsden, 11 C. & K. 309.

title.[1] By express statute in England, the property in stolen goods revests in the original owner, from the date of his having prosecuted the offender to conviction.[2] An order of restitution is not necessary, but he may bring an action for conversion against a purchaser in market overt without notice;[3] but such a purchaser, who has resold the goods before the conviction, is not liable, though he had notice before he resold them.[4] Market overt is not known to Indian or American law, and no property passes on the sale of stolen goods.[5] The amended Code of Criminal Procedure in Section 132, A, now gives power to Courts and Magistrates to order restitution; and in England the power was created, and now exists by express statute.[6]

Fraudulent sales.

249. If the property has been transferred by deed or actual delivery, though it was done for the purpose of effecting a fraud on third persons, the act is valid as between the parties, though void as to others, and neither of the parties can avoid it by showing the fraud.[7] But if there was no actual transfer of property, but only a deposit, though collusive for the purpose of protecting the property against creditors, the depositary or third party holding from him with notice, cannot rely upon the fraud to deprive the plaintiff of goods to which the depositary or such third party has no semblance of title.[8] A contract of sale of goods, obtained by fraud, may be enforced

1 Eicholtz v. Baunister, 11 Jur. N. S. 15; s. 109 I. C. Act.

2 24 & 25 Vict. c. 96, s. 100; Lindsay v. Cundy, 1 Q. B. D. 348.

3 Scattergood v. Silvester, 15 Q. B. 506.

4 Horwood v. Smith, 2 T. R. 750, 755; Lindsay v. Cundy, 1 Q. B. D. 357.

5 1 Hilliard, 76 (t); s. 108 I. C. Act.

6 The first statute was 21 H. 8, c. 11; see Queen v. Mayor, &c. London L. R. 4 Q. B. 371.

7 Twyne's Case, 1 Sm. L. C. 14.

8 Bowes v. Foster, 2 H. & N. 779; 27 L. J. 262 Exch.; Taylor v. Bowers, 1 Q. B. D. 291.

or disaffirmed by the party on whom the fraud was practised; but he cannot disaffirm the contract after the goods have been resold or pledged to, and passed into the hands of, a third person who took them in good faith, for value, and without notice.[1] But this is not so when a party has merely obtained the goods by theft or other means amounting to an offence, without any contract of sale to himself; as when he falsely and fraudulently represents that another person has authorized him to purchase the goods.[2] Then the original owner may recover the goods from a third person to whom they have been sold or pledged, though without notice of the fraud on the real owner.[3] If the property has passed to a third person, and so the goods cannot be recovered, the first owner may recover his loss from the party who originally obtained them from him. But a carrier who conveyed the goods, or an agent or broker through whose hands they passed, would not be liable to the first owner, unless such agent had in fact no principal at the time, and so was not a mere medium between buyer and seller.[4]

250. Bank-notes are treated as money or cash, and in the case of the loss of a bill or note by theft or accident, if the bill or note be assignable by mere delivery, the thief or finder may confer a title by transferring it to a person who takes it *bonâ fide*, and gives value, without notice, at the time, of any infirmity of title.[5] If taken honestly gross negligence only would not be suffi-

Bank-notes, bills, &c.

1 White *v.* Garden, 10 C. B. 919; Kingsford *v.* Merry, 11 Exch. 577; 26 L. J. 83 Exch.; Pease *v.* Gloahec, 12 Jur. N. S. 677; 1 Hilliard, 18—24; 2 id. 146; Clough *v.* L. and N. W. Ry. Co. L. R. 7 Exch. 35; excep. 3, s. 108 I. C. Act.

2 Kingsford *v.* Merry, supra; Higgins *v.* Barton, 26 L. J. 342 Exch.; s. 108, excep. 3, ill. *(f)* I. C. Act.

3 Hardman *v.* Booth, 9 Jur. N. S. 81.

4 S. 108 I. C. Act; Fowler *v.* Hollins, L. R. 7 Q. B. 616, and 7 H. L. 757; Arnold *v.* Cheque Bank, 1 C. P. D. 585.

5 Miller *v.* Race, 1 Sm. L. C. 389.

cient to invalidate the title, where value has been given. But gross negligence may be evidence of *mala fides* though it is not the same thing.[1] The giving less than full value is some evidence of dishonesty.[2] A man who takes only half a bank-note, takes it necessarily under suspicious circumstances; and the real owner may recover the half from any one who withholds it after demand.[3] Dishonesty may be inferred from the circumstances, as the amount of the note and the occasion on which it was taken;[4] or from paying a check which has been torn to pieces and pasted together again.[5] But the owner ought to be prepared to show that he has done all that could be required on his part to make known his loss.[6] If the bill, &c., is transferable by indorsement, a forged indorsement confers no title, and he who takes the bill will be guilty of a conversion, if he appropriates the bill, or refuses to deliver it upon demand;[7] unless he can show that the owner is estopped by reason of some neglect of duty in the transaction itself directly enabling the fraud to have been perpetrated upon the holder.[8] If a bill, &c, is overdue, the party taking it can have no better title than the party from whom he takes it.[9] A check is not intended for circulation, but for immediate payment, and if taken more than a reasonable time after its date, is no better than an overdue bill.[10]

1 Goodman *v.* Harvey, 4 A. and E. 870.

2 Raphael *v.* Bank of England, 17 C. B. 171.

3 Byles on Bills, 331; Chitty on Bills, 179.

4 Snow *v.* Peacock, 2 C. & P. 221.

5 Scholey *v.* Ramsbottom, 2 Camp. 485.

6 Chitty on Bills, 178.

7 Robarts *v.* Tucker, 16 Q. B. 560; Johnson *v.* Windle, 3 Bing. N. C. 225; Chitty on Bills, 272.

8 Arnold *v.* Cheque Bank, 1 C. P. D. 588; Bobbett *v.* Pinkett, 1 Exch. D. 368.

9 Chitty on Bills, 153.

10 Down *v.* Halling, 4 B. & C. 330; Byles on Bills, 144. As to the English law on crossed cheques, see 39 and 40 Vict. c. 81, and Smith *v.* Union Bank, L. R. 10 Q. B. 291.

251. Generally, the right to the possession of title deeds follows the right to the land; if A sells land to B and gives him forged title deeds, and then deposits the real deeds with C as security for a loan, B is entitled to recover the deeds from C.[1] As between tenant for life and vested remainderman, the former, as a general rule, is entitled to the custody of deeds, but the latter, for sufficient cause, may sue to have the deeds duly secured, or for the purpose of inspecting them;[2] but a contingent remainderman is not entitled to inspect the deeds;[3] and a tenant for life may sue a contingent remainderman for the detention of them.[4] There is no certain rule as to the custody of deeds among joint tenant or co-parceners;[5] whoever obtains possession of them may retain them; but still, on proper occasions, the Court will compel their production.[6] The person entitled to the beneficial interest in a contract or security, as a policy of insurance, is entitled to its custody.[7] A lessee is entitled to possession of the lease both during and after the term.[8] The obligor of a bond is entitled to an acquittance for the money due on the bond, but not to the possession of the bond itself:[9] so the payee of a note not negotiable is not bound to deliver it up on payment by the maker.[10]

Title deeds, &c.

252. The removal of a chattel, independent of any claim over it, may be a trespass, but is not a conversion. But any asportation of a chattel for

What is a conversion.

1 Newton *v.* Beck, 3 H. & N. 220; 27 L. J. 272 Exch.
2 Lempster *v.* Pomfret, 20 Beav. 405; Sugden's V. & P. (13th ed.) 369, 371 (n.); Tudor's L. C. on R. Pro. 54.
3 Noel *v.* Ward, 1 Mad. 322.
4 Allwood *v.* Heywood, 9 Jur. N. S. 108.
5 Elton *v.* Elton, 6 Jur. N. S. 136.
6 Lambert *v.* Rogers, 2 Mer. 489.
7 Watson *v.* McLean, E. B. and E. 75.
8 Hall *v.* Ball, 3 M. and G. 242.
9 Wain *v.* Bailey, 10 A. and E. 618.
10 Ibid. 616; but see Story on P. Notes, § 106.

the use of a defendant or some third person, is a conversion of it, though the act was done with a good intent, and the party himself does not thereby get possession of the chattel,[1] because it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it, at all times, and in all places.[2] Hence, the using a thing, as the wearing of a pearl, without the license of the owner is a conversion;[3] and where a person finds a thing, and misuses it, it is a conversion.[4] But the mere negligent dealing with goods by a bailee to whom they have been delivered, is not a conversion of them, though he may be liable to an action for the negligence. Every wilful and wrongful destruction of, or damage to, a chattel, whereby the owner is deprived of the use of it in its original state, if done with intent to take the property therein, or derive benefit therefrom, or to deprive the owner of the possession or use thereof, is a conversion; otherwise it will be a trespass.[5] Thus, the taking of wine from a cask, and filling the cask up with water, is a conversion of the whole.[6] The merely presenting one in possession of goods from removing them from one place to another is not a conversion.[7]

253. A person in lawful possession of goods may be guilty of a conversion of them, by dealing with them contrary to the orders of the owner.[8] It is not necessary that the party should deal with the goods as his own;

1 Hiort *v.* Bott, L. R. 9 Exch. 89.
2 Fouldes *v.* Willoughby, 8 M. and W. 540.
3 Lord Peter *v.* Heneage, 12 Mod. 519.
4 Mulgrave *v.* Ogden, Cro. Eliz. 219.
5 Simmons *v.* Lillyston, 8 Exch. 442.
6 Richardson *v.* Atkinson, 1 Strange, 576.
7 England *v.* Cowley, L. R. 8 Exch. 126.
8 Syeds *v.* Hay, 4 T. R. 260.

thus, the misdelivery of goods by a wharfinger or a carrier, though by mistake, is a conversion.[1] But the loss of goods by a carrier, being only an act of omission, and not of commission, is not a conversion.[2] Where the consignor has been imposed upon by a fictitious person, there is no misdelivery by the carrier if following the usual course of business, he delivers the goods at the address indicated.[3] Taking the plaintiff's property by assignment from another who has no right to dispose of it, is a conversion.[4] So, a wrongful sale of goods is a conversion.[5] If the holder of a bill for a specific purpose gets money on it by discount without authority, this is a conversion of the whole, though he may have received only part of the money due on it; and the whole amount may be given as damages.[6] But if A is entrusted with a bill to get it discounted, and afterwards misapplies the proceeds, an action for conversion is not the proper remedy.[7] So, where a broker, who is authorised to sell goods at a certain price, sells them at an inferior price it is no conversion, though he will be liable in another form.[8]

Conversion on demand and refusal.

254. When the goods of the plaintiff have not been wrongfully taken possession of by the defendant, but have lawfully come into his hands, there must be a demand and refusal, before he is liable for a conversion.[9] The demand and refusal do not, in themselves, constitute the conversion, but are only

1 Devereux v. Barclay, 2 B. & Ald. 702.

2 Stephenson v. Hart, 4 Bing. 483; Ross v. Johnson, 5 Bur. 2825.

3 McKean v. McIver, L. R. 6 Exch. 36.

4 M'Combie v. Davies, 6 East, 538.

5 Edwards v. Hooper, 11 M. & W. 363.

6 Alsager v. Close, 10 M. & W. 576.

7 Palmer v. Jarmain, 2 M. & W. 282.

8 These cases are used as illustrations, but, it will be observed, are cases between bailor and bailee, or principal and agent.

9 Thorogood v. Robinson, 6 Q. B. 769.

presumptive evidence (which may, therefore, be rebutted,) of a prior conversion.[1] A refusal must be proved, and mere excuses for not delivering the goods will not be sufficient.[2] Still the refusal need not be express.[3] If a defendant refuses to deliver except upon conditions which he has no right to impose, that is equivalent to an absolute refusal.[4] If the holder of goods improperly refuses to deliver them up, until the owner pay or secure a debt which he owes him, this is a conversion.[5] If a plaintiff demands more than he has a right to, a refusal is not evidence of a conversion of the smaller quantity to which the plaintiff was entitled, but which he did not demand.[6] So, it is no conversion, if the goods are not in the possession, and under the control of the defendant, at the time of the refusal.[7] If a person who finds goods, refuses to deliver them to the owner until he proves his right to them, such refusal is no evidence of a conversion.[8] So, a refusal by a servant to deliver up goods he has received from his master, without an order or authority from the latter, is a qualified, reasonable, and justifiable refusal.[9] But if there is no reasonable ground for doubt to whom the goods should be delivered, it will be a conversion.[10] And a refusal on the ground of a claim of right by another, is evidence of a conversion.[11] A bailee can never be in a better situation than the bailor. If the bailor has no title, the bailee can have none; and the bailee may be liable for a conversion, if he sets up the title of his bailor

1 Wilton *v.* Girdlestone, 5 B. & Ald. 847.
2 Severin *v.* Keppel, 4 Esp. 156.
3 Watkins *v.* Woolley, Gow, 69.
4 Davies *v.* Vernon, 6 Q. B. 443.
5 Sharp *v.* Pratt, 3 C. & P. 34.
6 Abington *v.* Lipscomb, 1 Q. B. 776.
7 Smith *v.* Young, 1 Camp. 441; Towne *v.* Lewis, 7 C. B. 608.
8 Gunton *v.* Nurse, 2 B. & B. 449.
9 Alexander *v.* Southey, 5 B. & Ald. 247.
10 Pillot *v.* Wilkinson, 10 Jur. N. S. 991.
11 Caunce *v.* Spanton, 7 M. & Gr. 963.

as the ground for refusing the demand of a third person, the real owner.[1] A refusal by a general agent is not evidence of a conversion by the principal, without proof of the authority for the particular refusal.[2]

255. The action may be brought against any person who was a party to the conversion, although the goods were actually converted by another.[3] A corporation is liable for acts done by its agent in the course of his ordinary duty; and it need not be shown that the conversion was authorised by an instrument under seal.[4] A servant is liable in an action for a conversion though for his master's benefit.[5] If one partner, tenant-in-common, or joint tenant, sells a chattel, not perhaps privately, but in market overt, so as to transfer the entire property therein, or does any act which operates as a total destruction of the thing held in common, this will be a conversion for which the co-tenants may have an action against him.[6] But one joint tenant cannot sue his co-tenant for conversion whilst the goods are in the co-tenant's possession.[7]

Who may be sued.

256. A frequent defence to an action for conversion, is the claim to be entitled to retain possession of the goods under a lien, either general or particular. But this defence generally arises where there is a privity of contract between the parties, and

Defences.

Lien.

1 Wilson v. Anderton, 1 B. and Ad. 450.
2 Pothonier v. Dawson, Holt. N. P. C. 383.
3 2 Wms. Saund. 47, m.
4 Smith v. Birmingham G. Co. 1 Ad. and E. 526; Yarborough v. Bank of England, 16 East, 6.
5 Stephens v. Elwell, 4 M. and S. 259.
6 Barnardiston v. Chapman, 4 East, 121; Higgins v. Thomas, 8 Q. B. 908; Maghew v. Herrick, 7 C. B. 229.
7 Harper v. Godsell, L. R. 5 Q. B. 428.

may be better considered hereafter. Another defence, also arising out of contract, but chiefly of importance in so far as it affects third persons, may, though, here be noticed; this is the right of stoppage in transit.[1] The right of an unpaid seller to stop goods whilst in transit, on the insolvency of the buyer, was first introduced in equity to prevent the injustice of one man's goods being used to pay another's debts.[2] It has not been expressly decided, but it would seem, that the exercise of the right only revests the possession, but does not rescind the contract, or revests the property.[3] It is like a lien, but is not a mere lien; it arises out of the original ownership of the seller,[4] who can, though, only retain the goods for the price agreed upon; so that the goods will remain at the risk of the buyer, and the seller cannot re-sell them (except under necessity), before the period of credit has expired.[5] The consignor, and not a surety for the price, can alone stop the goods;[6] but an agent abroad, purchasing in his own name, and charging commission, may stop them;[7] and so also, where one has consigned goods to be sold on the joint account of himself and the consignee.[8] To make a notice of stoppage effective, it must be given to the person who has immediate custody of the goods, or to the principal in time to order his agent or servant not to deliver.[9] An unauthorised stoppage is inoperative, if the ratification by the seller is after

Right to stop in transit.

1 The leading case on this subject is Lickbarrow *v.* Mason, 1 Sm. L. C. 595. See a good summary of the law in 1 Bell's Com. (6th ed.) 119—135.

2 1 Sm. L. C. 642.

3 Wentworth *v.* Outhwaite, 10 M. and W. 436; 1 Bell's Com. 134; *ex p.* Chalmers, L. R. 8 Ch. 289; and such is the apparent result of ss. 106, 107, I. C. Act.

4 Bloxam *v.* Sanders, 4 B. and C. 948.

5 1 Sm. L. C. 645.

6 Siffken *v.* Wray, 6 East, 371.

7 Feise *v.* Wray, 3 East, 93; The Tigris, 9 Jur. N. S. 361.

8 Newsom *v.* Thornton, 6 East, 17.

9 Whitehead *v.* Anderson, 9 M. and W. 518; s. 105 I. C. Act.

the time when he might himself have stopped the goods.[1]

257. Stoppage can only take place whilst the goods are on their way; if they once arrive at the end of their journey, and come into the actual or constructive possession of the consignee, there is an end of the seller's right.[2] The transit continues as long as the goods are in the hands of the carrier as such whether he was appointed by the buyer or seller;[3] but if he stores them as agent of the consignee; then the transit is at an end.[4] If the purchaser refuses to receive the goods, the transit is not ended.[5] If the goods actually were, or must be regarded as, shipped by the buyer, the transit ends as soon as the goods are put on board.[6] So, generally, when the goods reach a place where they are to be kept at the orders of the buyer, although the place be not that of their ultimate destination.[7] It seems that the buyer may take goods out of the possession of the carrier before their arrival, and so end the transit; but a mere demand is not enough, except at the place of consignment.[8] Though the contract with the consignor was to deliver at A, the consignee may order the carrier to deliver at a place short as B, and if he does so the carrier will not be liable to the consignor.[9] The carrier cannot prolong the

Transmit must be continuing.

1 Bird *v.* Brown, 4 Exch. 786; but see Hutchings *v.* Nunes, 10 Jur. N. S. 109.

2 Sm. L. C. 646.

3 Berndston *v.* Strang, L. R. 3 Ch. 588; Coventry *v.* Gladstone, L. R. 6 Eq. 44; Fraser *v.* Witt, id. 7 Eq. 64; s. 100 I. C. Act.

4 1 Sm. L. C. 646. Nicholls *v.* Lefevre, 2 Bing. N. C. 83; ill. *(c)* to s. 100 I. C. Act.

5 Bolton *v.* L. and Y. Ry. Co. L. R. 1 C. P. 431; ill. *(b)* to s. 100 I. C. Act.

6 Cowasjee *v.* Thompson, 5 Moore, P. C. 165; Schotsman *v.* L. and Y. Ry. Co. L. R. 2 Ch. 332; ill. *(d)* to s. 100 I. C. Act.

7 Wentworth *v.* Outhwaite, 10 M. and W. 436.

8 Whitehead *v.* Anderson, 9 M. and W. 518; Jackson *v.* Nichol, 5 Bing. N. C. 508.

9 Bartlett *v.* L. N. W. Ry. Co. 8 Jur. N. S. 58.

transit, at the end of the journey, by refusing to deliver on demand and tender of charges;[1] but where the carrier rightly exercises his right of lien, the transit is not ended, and the consignor's right to stop being the elder right may be exercised.[2] Thus goods landed at a sufferance wharf with a stop for freight are still in transit.[3] There may be a constructive taking of possession at the end of the journey, though there is no removal by the buyer, as by some act of ownership, as marking the goods.[4] To mark the goods during the journey does not give a constructive possession;[5] and if goods are in a warehouse when sold, till the keeper becomes the agent of the buyer, the goods are constructively in transit.[6] But if the buyer or consignee does not take possession as owner, it is no delivery.[7] So, if A sells to B, and takes a bill from B which is never paid, and B resells the goods, and gives a delivery order on A who does not object thereto, then, though C pays B, and B becomes insolvent, A has only the custody of the goods, and cannot retain them against C.[8] A delivery of part of the goods may, but does not necessarily, import an intention to deliver the whole, so as to put an end to the seller's right to stop the rest.[9] A delivery of part of the goods is a constructive delivery of the whole only where the delivery of the part takes place in the course of the delivery of the whole, and the taking possession of a part is a constructive acceptance of the whole.[10]

1 Bird *v.* Brown, 4 Exch. 786.

2 Butler *v.* Woolcot, 2 N. R. 64.

3 Meyerstein *v.* Barber, L. R. 2 C. P. 38; Ibid. 661, and 4 H. L. 317.

4 Ellis *v.* Hunt, 3 T. R. 464; Storeld *v.* Hughes, 14 East, 308; 1 Bell's Com. 125.

5 Whitehead *v.* Anderson, supra.

6 Dixon *v.* Yates, 5 B. & Ad. 313; ill. *(f)* to s. 90 I. C. Act.

7 James *v.* Griffin, 2 M. & W. 623.

8 Pearson *v.* Dawson, 27 L. J. 248 Q. B; ill. *(d)* to s. 90 I. C. Act.

9 Tanner *v.* Scorell, 14 M. and W. 28; Jones *v.* Jones, 8 M. & W. 431.

10 Bolton *v.* L. and Y. Ry. Co. L. R. 1 C. P. 431; s. 92 I. C. Act.

258. Generally, a second buyer can be in no better position than his immediate seller, but the right of the original seller to stop in transit may be defeated by an assignment of the bill of lading to a *bonâ fide* purchaser for value.[1] Hence, an assignment to the buyer's agent will not defeat the seller's right.[2] So the forbearance or release of an antecedent claim is not a good consideration for the indorsement of a bill of lading so as to defeat the unpaid vendor's right to stop in transit.[3] So, even a purchaser must have acted fairly and honestly, and without such notice or knowledge that the sale ought to be viewed as an act done in fraud of the right to stop.[4] If the buyer pledges the bills, the seller's right is subject to such *bonâ fide* pledge.[5] An actual indorsement and delivery of the bill of lading is not always essential, if the property is transferred in an equivalent manner.[6] So, though goods remain in the possession of the seller's agent, the right to stop may be defeated by a constructive delivery to the buyer; but there is none such where anything remains to be done by the seller, as if the goods have to be weighed.[7] The state of things at the time of the bill of lading being endorsed by the consignor affects the right; if a balance was then due to the consignee, goods shipped to meet it, are not sold on credit, and there is no right to stop.[8]

Right how defeated.

1 Lickbarrow *v.* Mason, 1 Sm. L. C. 595; ss. 101, 102 I. C. Act.

2 Waring *v.* Cox, 1 Camp. 369; 1 Bell's Com. 129.

3 Rodger *v.* Comptoir &c., L. R. 2 P. C. 393; ill (*b*) to s. 103 I. C. Act.

4 Cuming *v.* Brown, 9 East, 514.

5 *In re* Westzinthus, 5 B. & Ad. 817; Spalding *v.* Ruding, 6 Beav. 376; s. 103 I. C. Act.

6 Davis *v.* Reynolds, 4 Camp. 267; 2 Selw. N. P. 1294.

7 Harman *v.* Anderson, 2 Camp. 243; Abbot on Shipping, 403; Hanson *v.* Meyer, L. C. on Merc. Law, 505.

8 Vertue *v.* Jewell, 4 Camp. 31.

259. Other defences may be pleas denying the plaintiff's right of property where plaintiff sues relying on his right only;[1] or of possession, or showing that the detainer was in the exercise of a legal right consistent with a fact of a right of property being in the plaintiff, as that what the defendant did was in the exercise of his legal rights as joint-owner with the plaintiff,[2] or of some qualified right in the chattels.[3] So, a defendant may justify by showing that he took and detained cattle or goods whilst on his land doing damage, or that his acts were otherwise necessary at the time to protect himself from loss.[4] If the defendant, after conversion, re-delivers the goods, an action will still lie for the original conversion, and the re-delivery will only go in mitigation of damages.[5] A judgment in an action for conversion does not vest the property in the goods in the defendant, unless the judgment has been satisfied and their presumed value thus recovered as damages.[6]

Other defences.

260. The tort of trespass or conversion may be committed under cover of legal process. An officer of a Court seizing goods under a writ of execution, is responsible in damages if he takes the goods of a wrong party, even though he is misled by the plaintiff, or acts under a mistake.[7] So, he has no right to seize the goods of a stranger in the possession of the judgment-debtor as the ostensible owner;[8] but he will be excused if the owner has done anything to mislead him.[9]

Trespass and conversion under cover of legal process.

1 Butler v. Hobson, 4 Bing. N.C. 290.
2 Jones v. Brown, 25 L. J. 345 Exch.
3 Richards v. Symons, 8 Q. B. 90.
4 Rea v. Sheward, 2 M. & W. 424; Ackland v. Lutley, 9 A. and E. 879.
5 Griffiths v. Owen, 13 M. & W. 63.
6 Brinsmead v. Harrison, L. R. 7 C. P. 547; but see ante § 176.
7 Roberts v. Thomas, 6 T. R. 88; Jarmain v. Hooper, 7 Scott, N. R. 679.
8 Dawson v. Wood, 3 Taunt. 256.
9 Langford v. Foot, 2 M. & Scott, 349.

An illegal seizure of goods under void process does not prevent the officer from afterwards executing a legal warrant.[1] The subsequent valid seizure is in no wise vitiated by the previous trespass, but a different rule prevails with respect to an illegal arrest.[2] But a judgment-creditor may claim property which a judgment-debtor has disabled himself from claiming, for an estoppel, which would be binding against the judgment-debtor, in a claim put forward by him, will not be binding upon the judgment-creditor or the Court's officer, who are strangers to the acts of the judgment-debtor.[3] A sale of more than sufficient goods to satisfy the writ will make the officer liable in damages to the execution-debtor;[4] but if goods are let to, and were in the possession of, the debtor when sold, the officer is not liable to the owner unless actual damage is shown, for all that is ever sold is the right, title, and interest of the debtor.[5] Section 88 of the Code of Civil Procedure may be consulted for the remedy of a defendant, where a plaintiff has improperly procured the attachment of his property before judgment: but the defendant may elect to bring a separate suit against the plaintiff for such injury.

260, *a.* In many States of America attachment before judgment has been expressly enacted. Some of the points decided under these laws are as follows. By attaching goods the officer acquires a special property in them, and may sue a wrongdoer for an injury to them.[6] If the defendant had sufficient property to satisfy the plaintiff's demand, the officer is liable if he does not attach sufficient property.[7]

1 Percival *v.* Stamp, 9 Exch. 167.

2 Hooper *v.* Lane, 6 H. L. C. 443.

3 Richards *v.* Johnson, 28 L. J. 322 Exch.

4 Batchelor *v.* Vyse, 4 M. & Sc. 552.

5 Tancred *v.* Allgood, 28 L. J. 862 Exch.

6 2 Hilliard, 241.

7 Id. 243.

He must provide for live animals attached, and the fear of the expense will not excuse his not retaining them when attached.[1] If upon the representation of the plaintiff he seize goods of a third person as the goods of the defendant, and the third person recovers damages from the officer, the officer may recover them from the plaintiff, though there was no fraud in the representation by the plaintiff, or knowledge of its falsehood.[2] But without special orders from the plaintiff he ought not to attach goods not in the possession of the defendant: and he is not liable for refusing to attach disputed property unless he is indemnified.[3] If he is in doubt he should insist on the plaintiff showing the goods to him, and on his being indemnified.[4] To render an officer liable for attaching the goods of a third party, there should be notice, and a demand and refusal to re-deliver.[5] An attachment does not change the ownership of the property. The officer is the agent of both parties, and may be liable to either. But a loss without the neglect of the officer or plaintiff, must fall on the defendant; but a plaintiff is not jointly liable with the officer for any wrong by the officer, unless he participated in it, or ratified it.[6] There may be several successive attachments of the same property, and the officer may be liable to any attaching creditor suffering loss from his default.[7] If the officer can show that the plaintiff would have derived no benefit from an attachment if he had made it, the plaintiff will be entitled to nominal damages only.[8]

1 2 Hilliard, 244.
2 Id. 248; and see Humphreys *v.* Pratt, 5 Bligh, N. S. 154.
3 2 Hilliard, 248.
4 Id. 249.
5 Id. 249.
6 Id. 251.
7 Id. 256.
8 Id. 261.

261. A tort very analagous to conversion is the detention or adverse withholding of the goods of another. The remedy in English law is an action of detinue. It lies for the specific recovery of chattels wrongfully detained from the person entitled to the possession of them, and also for the damages occasioned by the wrongful detainer. The defendant had, or was assumed to have, come lawfully into possession, as by delivery or finding;[1] but as the gist of the action is the wrongful detention of goods, it is, in substance, and is now in form, an action for a wrong independent of contract;[2] and it is immaterial whether the goods were obtained by defendant, by lawful means, as by a bailment or finding, or by a wrongful act, as a trespass or conversion.[3] The injury complained of is not the taking, nor the misuse and appropriation of the goods, but only the detention. The plaintiff must, as in conversion, have a special or general property, and a right to the immediate possession.[4] As the object is to recover the specific goods, they must be ascertained and capable of identification, and the nature of the things must continue without alteration; the action will not lie for a sum of money or a quantity of grain, unless they be specifically distinguished from other property of the same kind, as by being placed in a bag or sack.[5]

TORT BY DETENTION.

262. The usual evidence of the detention is, that the defendant, having the possession of, or control over, the goods does not deliver them to

When the action lies.

1 See old form of declaration in Stephen on Pl. (5th ed.) 38.

2 Broadbent *v.* Ledward, 11 Ad. & E. 209; C. L. Pro. Act, 1852, Sch. B. 29.

3 1 Chit. Pl. (7th ed.) 137; Bullen and Leake, 185.

4 Bullen and Leake, 185.

5 1 Selw. N. P. 661.

the plaintiff when demanded.[1] Where the property has passed on a sale with payment or on credit, and the seller keeps the goods bought, detinue will lie.[2] So, it may be brought for the title deeds of a real estate; and the proper party to sue in such a case, is the person entitled to the legal interest in the estate.[3] The receiver of letters has such a property in the paper on which they are written, as that he may maintain detinue against the sender if, by any means, the letters get back into the possession of the latter.[4] A person having in his possession the goods of another, whom he knows to be the owner, has no right to detain them until he has a written receipt for them.[5] The action does not lie against one who never had possession of the chattel, but it does against one who once had, but has improperly parted with the possession of it;[6] it is no defence that the defendant having had possession of the plaintiff's goods, has wrongfully sold them, or carelessly lost them.[7] The judgment should be that the plaintiff recover the goods, or their value, together with damages and costs; this may be by a decree framed under Section 191 of the Code of Civil Procedure. The damages are in general merely nominal; but the value of the goods detained should be found, and special damages for the detention may be given if proved.[8] From the alternative character of the judgment, the property in the goods detained does not vest in the defendant, till the plaintiff has signified his election to abandon it by

1 Jones *v.* Dowle, 9 M. and W. 19.

2 Bul. N. P. 2, 50; Bateman *v.* Elman, Cro. Eliz. 867.

3 See ante § 251.

4 Oliver *v.* Oliver, 8 Jur. N. S. 512.

5 Barnett *v.* Crystal P. Co. 2 F. and F. 443.

6 Jones *v.* Dowle, supra.

7 Reeve *v.* Palmer, 27 L. J. 327 C. P.; 28 L. J. 168 C. P.; Goodman *v.* Boycott, 8 Jur. N. S. 763.

8 Phillips *v.* Jones, 15 Q. B. 859; Crossfield *v.* Such, 8 Exch. 159.

issuing execution for the value, instead of resorting to the means for compelling a delivery provided by Section 200 of the Code of Civil Procedure.[1]

263. The preceding torts to personal property belong, in regard to their nature, to the first class, inasmuch as the tort consists in the invasion of a general right; the next instances of torts to be considered will be the analogous torts of wrongful distress, either of cattle, &c., taken damage feasant, or of the chattels of the tenant by the landlord. Both are peculiar, in that the wrong consists in the excessive or wrongful exercise of a right; and, therefore, both may be said to belong to the other classes of torts in which the tort is constituted by the breach of a duty; the former, as it consists of the abuse of a right, available against all, and existing at common law or by express enactment, may be ranked as a tort of the second class by the breach of a public duty; the latter consists of the abuse of a right existing by express law, but limited as to those who are affected by it, as it is consequent upon a relation by contract; and thus it falls within the 3rd class of torts by breach of a private duty.

WRONGFUL DISTRESS—how classed among torts.

264. The Indian Acts, 3 of 1857, 5 of 1860, and 22 of 1861 contain special provisions regarding the impounding of cattle taken trespassing and doing damage. This is a special and summary remedy, and when taken advantage of, the provisions of the law must be strictly followed. The ordinary civil remedy for the trespass is not hereby taken away, and on the other hand, the remedy for a wrongful distress need not, it would seem, be limited to that given by Act 3 of

Wrongful distress—damage feasant.

1 Compare C. L. Pro. Act 1854, s. 78.

1857. By the English law every occupier of land has a right to seize animals and chattels trespassing upon and doing damage to his land, and to detain them till he is tendered or paid a fair compensation for the damage;[1] but the distress must be taken at the time the damage is done; if the cattle have been driven, or have escaped off the land before they are seized, there is an end of the power to distrain;[2] and it is the same by the Indian Acts, except only when a person has wilfully caused the cattle to trespass.[3] It seems that the Roman law did not allow of this detention or impounding of cattle, but merely gave an action for the damage.[4] It may be doubted if the right would be held to exist in India except under the Acts cited above. Its exercise under them must, though, it is to be presumed, be subject to similar rules as to what constitutes a wrongful distress, as have been recognized by the English law.

Neglect of distrainor.

265. If the owner of lands adjoining a highway, is bound, by express law or prescription, to fence against the highway, and neglects to do so, and cattle, whilst passing along the highway under the care of the owner or his servants, stray therefrom into the adjoining land, and do damage there, the owner of such adjoining land, who has brought the mischief upon himself by neglecting to fence, has no right to distrain the cattle, unless they are abandoned or left there by the owner or his servants an unreasonable time.[5] So, if a man has an outer and an inner field, and he is bound to fence the outer field, he cannot distrain cattle which having come upon the outer field through defect in the fence, afterwards break

1 1 Inst. 142 a, 161 a.
2 Selw. N. P. 679.
3 Act 3 of 1857, ss. 2, 17.
4 Domat, B 2, T. 8, s. 2 preamble.
5 Goodwyn v. Cheveley, 28 L. J. 298 Exch.

through the sufficient fence of the inner field.[1] If a man, having tempting crops, will not take the ordinary means people do of fencing their land from the public highway, and cattle stray upon the crops, it is enough if the drovers take steps, as soon as they reasonably can, to drive off the cattle, and the owner of the field cannot instantly seize the cattle.[2] But if the owner of the cattle has entrusted the cattle to incompetent boys, or an insufficient number of drovers, he is himself in default, and his cattle may be seized, though the owner of the land was bound to fence against the highway.[3] When cattle are being driven along a road, they are lawfully using it; and horses grazing on the side of a road, but under the charge and efficient control of a man are not to be deemed as wandering or straying on the road.[4] But if cattle have strayed into the high road, and have passed therefrom into an adjoining field, they may be distrained, though the owner of the field was bound to fence; because the cattle were wrongfully on the road, and the owner of the field is not bound to fence against trespassers.[5]

Cattle, &c., in actual use at the time.

266. The right of the owner or occupier of land to seize and detain animals and chattels trespassing upon and doing damage to his land, is restricted to such animals and chattels as are not in the actual possession and use, and under the personal care, of some human being.[6] If a man rides upon my crops, I cannot take his horse damage feasant, for that would lead

1 Singleton v. Williamson, 8 Jur. N. S. 60.

2 Goodwyn v. Cheveley, supra.

3 Addison, 461.

4 Morris v. Jeffries, L. R. 1 Q. B. 261.

5 Dovaston v. Payne, 2 Sm. L. C. 113.

6 Simpson v. Hartopp, 1 Sm. L. C. 319.

to a breach of the peace;[1] neither can I take a horse and cart away from a man who is actually driving it, nor a horse or a dog which a man is leading by a rope, nor any animal which is under the immediate control of the owner.[2]

267. By the English law, if one comes to distrain beasts damage feasant, and before the distress the owner of the beasts tenders sufficient amends, and the distrainor refuses it, the latter becomes a wrongdoer if he then distrains. Tender before the distress makes the distress tortious. Tender after the distress makes the detainer, and not the taking, wrongful. A tender of sufficient amends after impounding has been said to be too late;[3] but if all expenses are also tendered, it ought not to be so, but should make any subsequent sale illegal.[4] It is for the owner of the cattle to take care that he tenders a sufficient amount; otherwise he cannot complain of the refusal, or of an exorbitant demand for compensation.[5]

Tender of compensation.

268. By the Roman law, and it should be so by every law, he who takes or drives out the cattle of another person feeding on his ground or doing any other damage, is responsible for any violence doing hurt to the cattle, or for driving them in any other manner than he would his own; and if he causes any damage to the cattle, he is bound to make it good.[6] In England, if the usual pound is in an obviously unfit state, he is liable for any damage if he pounds the cattle there; he ought to find another proper pound.[7] But by the Indian

Damage done to cattle, &c., distrained.

1 Story v. Robinson, 6 T. R. 138.
2 Field v. Adames, 12 A. and E. 649.
3 Six Carpenters' Case, 1 Sm. L. C. 114; Singleton v. Williamson, 8 Jur. N. S. 157; but see now C. L. Pro. Act 1860, s. 23.
4 Johnson v. Upham, 28 L. J. 252 Q. B.
5 Gulliver v. Cosens, 1 C. B. 788.
6 Domat, B. 2, T. 8, s. 2, art. 4.
7 Wilder v. Speer, 8 A. and E. 47.

Acts, the cattle must be taken to the public pound within a reasonable time, and it would seem that the pound-keeper would be the party liable for damage from the state of the pound.

269. A public pound-keeper will not be liable for any precedent tortious act in taking the cattle, of which he could know nothing. He is bound to take and keep whatever is brought to him, at the peril of the person who brings it, without any judgment, direction, examination, or warrant; and if the things have been wrongfully taken, the person bringing them to the pound, and not the pound-keeper, is responsible for the wrong.[1]

Liability of a pound-keeper.

270. The right of a landlord to destrain the goods of his tenant upon the demised premises, in default of the payment of rent, is a right existing by the common or unwritten law of England; but it is not a right recognized by universal law; and in England its origin is clearly traceable to special feudal rights and duties, the power having always attended the fealty.[2] The exercise of the right has since been defined and controlled by express enactments in England; and in India, wherever the right exists at all, it is similarly regulated, as, for instance, in the Madras Presidency by the local Act 8 of 1865. The proper enactment must be specially consulted to determine whether a particular distress is wrongful or otherwise; where the right is created by express law, its exercise must be in all respects strictly in accordance therewith; otherwise the distrainor will be a wrongdoer, and will be liable as an ordinary trespasser.

Wrongful distress for rent.

1 Badkin v. Powell, Cowp. 476; 1 Selw. N. P. 686.

2 1 Reeves's Hist. 32, 174; Co. Litt. 150, b.

271. The next class of torts to be considered is where the tort consists of a breach of private duty arising out of a contract between the parties, this comprises the numerous class of contracts termed bailments, and as the nature and extent of the duties of the parties towards each other vary considerably, it will be convenient to take the different kinds of bailments separately. But as to bailments in general it may be premised, that a bailment is a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust.[1] The re-delivery is generally, but not always, part of the contract; thus, the consignment of goods to an agent or factor for sale is a bailment, but no re-delivery is contemplated.[2] Bailments are properly divisible into three kinds. 1. Those in which the trust is exclusively for the benefit of the bailor, or of a third person. 2. Those in which the trust is exclusively for the benefit of the bailee; and, 3. Those in which the trust is for the benefit of both parties, or of both or one of them and a third party. The first embraces deposits and mandates; the second, gratuitous loans for use; and the third, pledges or pawns, and hiring, or letting to hire.[3]

TORTS ARISING OUT OF BAILMENTS.

Bailments defined and classed.

272. The liability of the bailee to the bailor varies with the kind of bailment. In the first class the contract being gratuitous on the part of the bailee, his promise is not supported by a legal consideration, and its performance is, therefore, not enforceable, as long as nothing has been done; but

Non-feasance and misfeasance in gratuitous bailments.

1 Story on Bailm. 2. The references to Story's works are to the sections; s. 148 I. C. Act.

2 Story on B. 2 (n.)

3 Id. 3.

if the bailee once enters upon the trust, and takes the goods into his possession, then he will be liable for any damage from the ill performance of his contract; the confidence inducing another to trust him with his goods, is a sufficient legal consideration to support an action for a breach of duty.[1] In other words, the rule is, that, in gratuitous contracts, an action will lie for misfeasance, but not for mere non-feasance.[2] The breach of duty consists in negligence, that is, the absence of diligence.

Diligence, what is.

What is diligence is more a matter of fact, than of law; and in different countries the standard is necessarily variable with respect to the facts, although it may be uniform with respect to the principle.[3] It has to be judged of by the actual state of society, the habits of business, the general usages of life, and the dangers, as well as the institutions, peculiar to the age. The same precautions may not be needed in a quiet country-place as in a crowded city, or during a period of lawlessness. So, the usual practice of the place or business may indicate the caution usually found to be, and considered necessary. So, the nature and value of the objects of the bailment affect the liability; a man would not be expected to take the same care of a bale of cotton as of a box of diamonds, or other jewelry.[4]

273. The Indian Contract Act in Section 151 provides that in all cases of bailments, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods

1 Coggs *v.* Bernard, 1 Sm. L.C. 147 is the leading case on bailments.
2 Story on B. 9.
3 Id. 11.
4 Id. 13—15.

bailed. By English law the negligence inducing liability has been said to vary with the kind of bailment, and the attempt to define the several degrees of diligence has led to much discussion.[1] There have been said to be three degrees of diligence, namely, exact, ordinary, and slight. So there are said to be three degrees of negligence, namely, gross, ordinary, and slight. Ordinary diligence is then the use of such precautions only, as persons of average prudence would employ, having respect to the time, place, and object of the care. But the omission of such ordinary precautions would not be ordinary, but gross, negligence. The use of every possible precaution, or of more than the ordinary precautions, is exact diligence, and the omission of some such diligence is slight negligence. The general rule arrived at may be thus stated, namely, that in the third class of bailments, which are equally for the benefit of both parties, ordinary diligence is exacted of the bailee, and the omission of any of the ordinary precautions induces liability; but there are some special exceptions in this class, in which exact diligence is required. In the first class of bailments, which are for the benefit of the bailor alone, the burden on the bailee is less; he is said to be bound only to slight diligence, and liable for gross negligence; the rule means, that he is not expected to be so scrupulously exact as to use all ordinary precautions (for this would be requiring of him ordinary diligence), but still he is not excused for a total neglect of them. In the second class of bailments, which are for the benefit of the bailee alone, he is bound to exact diligence, and liable

Degrees of diligence and negligence.

1 On this discussion, see Story on B. 16-21 and 570 and the case in the notes; see also Grill v. G. &c. Co. L. R. 1 C. P. 612, and Austin's Juris. lec. XX.

for slight negligence; as he alone takes the benefit, he ought to use more than ordinary precautions, and be liable for a loss which, by the use of any precaution, might have been avoided.[1] The Indian Contract Act, it has been seen, simply requires the same degree of diligence in all bailments, and defines only diligence.

274. As a general rule, bailees are not responsible for loss from inevitable accident, as by lightning, perils of the seas, sudden death or illness, or irresistible force, as the inroads of hostile armies, &c.; robbery, as distinguished from theft, is such irresistible force;[2] as to loss by theft, the liability depends upon the circumstances of each case; it may, or may not, be evidence of negligence by the bailee; but there is no presumption either way from the mere fact of theft.[3] So, generally, the ordinary responsibility of the bailee may be diminished or enlarged by a special contract; but it is never allowed for a bailee to contract not to be liable for loss from his own fraud.[4] In a confusion of property, it seems, that where the mixture of the goods was by consent or by mere accident, the bailor and bailee will have a common property in the mixture produced; where it was wilful or negligent, if the goods of each can still be identified, or if, though not separable, they remain of the same nature and value, so that a division can be made, the rights of each remain unaltered, the bailee being liable for any incidental loss; otherwise, the bailee who caused the confusion, must bear the whole loss.[5] These are general rules to which, it

Loss by accident or force.

Contract as to liability.

Rights in a confusion of property.

1 Story on B. 23.
2 Id. 25, 26, 36, 37.
3 Id. 27, 35, 38, 39.
4 Id. 32; s. 152 I. C. Act.
5 Story on B. 40, 2 Bl. Com. 405; Supton *v.* White, 15 Ves. 432; 1 Hilliard, 550; ss. 155, 156, 157 I. C. Act.

will be found, there are some exceptions as to particular kinds of bailments.

275. A deposit is a naked bailment of goods to be kept without reward, and returned when required, either to the bailor or another, according to the original purpose.[1] A deposit may be *necessary*, as in the case of fire or other calamity; or *voluntary*, that is, consequent upon the contract of the parties; or *involuntary*, that is, without the act or assent of the bailor, as where timber is carried by a flood on to the land of another.[2] The Roman law also distinguished *simple* deposits from *sequestrations*, where one or more, having adverse interests, make a deposit, and the bailee is a mere stake-holder. Sequestrations are either conventional, that is, by agreement, or judicial, that is, by the order of a court; in the former, the liability of the depositary is the same as ordinarily; in the latter, if compensation is paid to him, he is in the position of one who has the custody of goods for hire.[3] A deposit proper differs from a *mutuum*, where not the identical thing, but another, the same in kind and value, is to be returned.[4]

DEPOSIT.

276. The subject-matter of a deposit is, by English law, confined to moveable property; but title deeds, evidences of debts, and choses in action are included.[5] It is sufficient if the bailor has a special property in, or lawful possession of, the subject; and he need not have an absolute title; he may even hold by wrong as against the real

Subject-matter.

Title of bailor.

1 Story on B. 41.
2 Id. 41, 44 a.
3 Id. 45, 46.
4 Id. 47.
5 Id. 51.

owner, and yet make a deposit.[1] The right owner may, of course, recover the deposit from the bailee, and so if the bailee turns out to be the owner, he may retain it.[2] The essentials of a deposit are, (1) a delivery, actual or constructive, as with the privity and approbation of the bailor;[3] (2) a proper intent, that is, of keeping for the owner; another purpose will change the nature of the contract;[4] (3) the custody must be gratuitous;[5] (4) the bailee must ordinarily be some other than the owner; but a bailor having a special property in the goods, might make a good deposit of them with the owner;[6] (5) voluntary consent of both parties; a real mistake as to the contract, but not a mere mistake as to quantity or quality, will vitiate the transaction;[7] (6) a voluntary undertaking by the bailee, as with his knowledge and assent; this may sometimes be assumed.[8]

Essentials of a deposit.

277. The first duty of the bailee is to keep the deposit with reasonable care; he is bound to use the degree of care defined in Section 151, I. C. Act. In the Roman law (where gross negligence and fraud were deemed equivalent), if the bailee kept the goods as he kept his own, he was not liable, as the idea of fraud was rebutted. But it is not so by the English law; gross negligence may be presumptive of fraud, but the bailee will be liable for the former, though there is no room to presume the latter. Still the character of the bailee may be important, as where the bailor knew he was an habitual drunkard, grossly careless, of weak intellect, &c. But the

Duty of bailee as to care.

1 Story on B. 52.
2 Id. 53.
3 Id. 55; s. 149 I. C. Act.
4 Story on B. 56.
5 Id. 57.
6 Id. 58.
7 Id. 59.
8 Id. 60.

effect of this is to raise a special contract, not to vary the above rule; so that if there was no such knowledge, the bailee will be liable.[1] Though there is a distinction between a gratuitous contract to keep or carry goods, and one to keep or carry them safely, the distinction is as to a contract of actual insurance of safety, and one to take due care for their safety. In the latter sense, an obligation to keep or carry seems to include an obligation to keep or carry safely.[2] It is now settled that loss by theft is not conclusive of want of ordinary diligence.[3] An assent to keep in a particular place, does not relieve from gross negligence in so keeping there.[4]

Rule where contents are not known.

278. Where the contents of a box, &c., are unknown to the bailee, the rule has settled down thus, (1) if there was a general knowledge that the contents were valuables, care due to such must be used; (2) if no such knowledge, then the care due to articles of common value; (3) if there was wilful concealment of value in order to induce the bailee to accept the deposit, then, on loss by negligence, he is liable only for the box, and not for the contents.[5] The general rule as to the diligence to be used may be varied by a special contract;[6] where the bailee made the offer to keep, it has been thought that greater diligence is required; but such a rule does not appear satisfactory.[7]

279. In necessary deposits the law does not vary the

1 Story on B. 62—68.

2 Collett v. London Ry. Co. 16 Q. B. 984; Coggs v. Bernard, 1 Sm. L. C. 163; Story on B. 69, 72.

3 Story on B. 73.

4 Id. 74.

5 Id. 75—78.

6 Id. 79; s. 152 I. C. Act.

7 Story on B. 81, 82.

Care in involuntary deposits.

responsibility of the bailee.[1] In involuntary deposits the law is unsettled; probably the owner of the land will have the same responsibility as the finder of goods. If the deposit was from inevitable causes, as the force of the elements, then the owner may enter and remove his goods, doing as little damage as may be; but if it was from his own negligence, then, without leave asked it would be a trespass for him to enter; and when goods so come upon the land of another, the owner will be liable for the trespass; and even in the former case, if after due notice he neglects to remove his goods. An improper refusal by the owner of the land would be a conversion of the goods.[2] With regard to the finder of property, the better opinion now is, that he is not bound to take charge of the goods, but if he does so, he has the same responsibility as an ordinary depositary.[3] Money deposited in a bank is generally a *mutuum* or irregular deposit, as the identical coin is not to be returned;[4] but there may be a regular deposit of coin, and where such a deposit had been kept with due diligence, but had been embezzled by the cashier, the bank was held not liable, as there had been no gross negligence in the keeping.[5] Bankers who are gratuitous bailees for safe custody of the securities deposited by their customers, are only liable for the want of that ordinary diligence which men of common prudence generally exercise in their own affairs.[6]

280. Generally, a bailee may not use the thing deposited;

1 Story on B. 83.
2 Id. 83 a.
3 Id. 85—87; Isaac *v.* Clarke, 2 Bulst. 312; s. 168 I. C. Act.
4 Story on B. 84.
5 Id. 88; Foster *v.* Essex Bank. 17 Mass, R. 479; 2 Hilliard, 356.
6 Giblin *v.* McMullen, L. R. 2 P. C. 317.

Use of the deposit by bailee.

but if it is necessary for its preservation, he must do so, as to milk a cow, exercise a horse. The test is, can the consent of the owner be implied? if it is for the benefit of the thing, then of course; but if valuables be locked up, then no, for the use may subject them to perils; so if books be left open, then consent to use them may be implied, but not if they are very valuable; so paintings may be used for ornament in a private room, but not for general parade.[1] The depositary of a will is not (as under the Roman law), liable for revealing its contents, unless positive damage results.[2]

Nature of depositary's interest.

281. It seems more correct to say that a depositary has a possessory interest, rather than a special property, in the thing deposited.[3] As against a mere wrongdoer, he may have an action for conversion as well as trespass; but the bailor, as well as the bailee, may sue such wrongdoer, and a recovery of damages by either will be a bar to a suit by the other.[4]

Duty of bailee to return the deposit.

282. The second duty of the depositary is to return the deposit without demand when the time or the purpose of the bailment is at an end; but in many cases it is the request of the bailor that ends the bailment. The identical thing must be returned, and any increase or profits along with it.[5] Generally, the return must be made to the bailor; but where the bailor had no title, the real owner may recover, for the bailee cannot be in a better situation than his bailor.[6] But if A bails goods to B to be delivered to C, unless there is a

1 Story on B. 89—92.
2 Id. 92.
3 Id. 93—93 i.; Gills v. Grover, 6 Bligh, 277, 452.
4 Story on B. 94, 95; s. 180 I. C. Act.
5 Id. 99; ss. 160, 163 I. C. Act.
6 Id. 102, 108; s. 167 I. C. Act.

clear undertaking of B with C, and not a mere receipt by B, C can have no action against B; for instance, a remittance of money to a banker with directions to pay a third person, there must be an assent to do so, and a receipt is not sufficient.[1] Where the first bailee has bailed to a second, the bailor may demand and recover from either, but a delivery by the second bailee will bar an action against the first.[2] On a bailment by a servant, without notice, there may generally be a re-delivery to the servant.[3] Where the bailment was in a special character, and the trust has terminated, the delivery should be to the real owner; for instance, deposit by a guardian, and the ward has since come of age, the delivery should be to him: so, where a third person by forfeiture, &c. has succeeded to the property.[4] Where two persons claim adversely without any privity between them (as there is between bailor and first bailee), the bailee will deliver to either at his peril; and, unless he can compel them to interplead, it is safer to deliver to one of them on being indemnified.[5] Where there has been a joint deposit by two or more (and not merely a joint interest in the deposit), the return may be made to any one without the consent of all;[6] where there are joint depositaries, each is liable for the restitution of the whole deposit.[7] The limitation of the right of action against the bailee runs from the termination of the bailment, and not from the date of any prior conversion of the thing bailed.[8]

1 Story on B. 163; Baron *v.* Husband, 4 B. and Ad. 612.

2 Story on B. 105.

3 Id. 106, 108.

4 Id. 109.

5 Id. 110—113.

6 S. 165 I. C. Act; the English law is otherwise, Brandson *v.* Scott, 7 E. and B. 234; Story on B. 114, 115.

7 Story on B. 116.

8 Wilkinson *v.* Verity, L. R. 6 C. P. 206.

283. Ordinarily the place for restitution is the place of deposit, unless otherwise agreed; if the goods are kept at the depositary's residence, then there, or if there is a choice of places, the choice will rest with the depositary.[1] The time for restitution is immediately on the expiration of the time or the accomplishment of the purpose of the bailment, or on demand; but this assumes that the demand is made at a reasonable time, and also that a reasonable period is allowed for delivery.[2] Generally, the bailee is entitled to recover all necessary expenses incurred by him, and by the Roman and French laws he has a particular lien therefor.[3] In involuntary deposits, and by finding, the bailee has not, by the English common law, any lien for expenses incurred, but he may sue to recover them; by the Indian law he has a lien but may not sue to recover them, though he may after a time sell vendible things when perishable, or when the expenses amount to two-thirds of their value.[4] If a specific reward is offered to any finder, then he may sue for the same, and he has a particular lien therefor; but not if it is a mere general offer, as of "a liberal reward."[5] After an improper refusal to deliver, the property is at the absolute risk of the bailee, however it may perish or be damaged; and he is also liable to pay interest, or make other compensation for the detention of the property.[6]

Place and time of restitution.

Charges.

Refusal.

284. The next bailment belongs to the same class, and is called a mandate: it is a bailment of personal property, as to which the bailee en-

Mandate.

1 Story on B. 117, 118.
2 Id. 107, 119, 120; s. 160 I. C. Act.
3 Id. 121; ss. 158, 170 I. C. Act.
4 Nicholson *v.* Chapman, 2 H. Bl. 254; ss. 168, 169 I. C. Act.
5 Story on B. 121 a, 621 a; see Tarner *v.* Walker, L. R. 2 Q. B. 301 on giving information entitling to a reward.
6 Story on B. 122, 123; s. 161 I. C. Act.

gages to do some act without reward, as to carry or do any work upon goods.[1] The Roman law allowed of a mandate of an act to be done upon real property; and some laws rank as a mandate an undertaking to do an act, without any delivery of property, as to buy stock, &c.; but our law would class the former as a special undertaking, and the latter as an act of agency.[2] The essentials are, (1) a proper act as the subject-matter of the mandates; it must have regard to something that is to be done, and not that is already done; the thing to be done must be certain, and of such a nature that it will be the act of the mandator through the mandatary; and it must not be vain or absurd, or one that concerns only the interest of the mandatary alone, but it should be for the interest of the mandator alone, or for the joint interest of both parties, or for the interest of a third person (the act being one for which the mandator would be liable if not done), or for the joint interest of such third person, and of either the mandator or the mandatary.[3] The mandatary has the same possessory interest as a depositary, in the chattel the object of the act; he has also a lien upon it for expenses incurred upon it.[4] (2) The act must be done gratuitously; otherwise it may be a contract of hiring:[5] but the mandatary may recover, by action, the actual expenses he is put to.[6] The other essentials are those common to all contracts, as a voluntary consent free from error and fraud, a lawful act, and parties competent to bind themselves.

285. The first duty of the mandatary is to do the act, but

1 Story on B. 137; s. 158 I. C. Act.
2 Story on B. 141, 142.
3 Id. 145—149, 151.
4 Id. 156; s. 170 I. C. Act.
5 Story on B. 153.
6 Id. 154; s. 158 I. C. Act.

Duty of mandatary to do the act.

this is only where there has been some performance by the mandator, as by delivery of the chattel, &c.; then the confidence induced by undertaking any service for another, is a sufficient legal consideration to create a duty in the performance of it; otherwise, the contract being gratuitous there would be no consideration, and no liability for non-feasance; but performance by the mandator gives a ground for an action;[1] thus, if A entrusts a letter, containing money, to B to deliver to a banker in order to meet a bill of A's; and B neglects to do so, and damage ensues, B will be liable to A.[2] The next duty is to exercise reasonable skill and care. The contract is gratuitous, and for the benefit of the mandator, but the mandatary is still bound to use the diligence prescribed by Section 151 I. C. Act.[3] Where the mandatary exercises a particular profession or calling, as a physician, pleader, or artisan, then the neglect to exercise the ordinary skill and care of a professional man, will be the same as negligence, though it might not be so in a non-professional man; but this is rather on the ground of a special contract on an implied warranty of skill.[4] There is no distinction as to the diligence required where the mandate is to carry goods, and where it is to do some work upon them.[5] The unpaid directors or managers of a bank or company may, it seems, be liable to the shareholders for losses occurring through the negligence of the directors in the exercise of their duties.[6] Where there has been a misuser of the property, or fraud, the mandatary will be liable for

Skill and care required.

1 Story on B. 164—171; Coggs *v.* Bernard, 1 Sm. L. C. 147.

2 Story on B. 171 a.

3 Id. 173, 174.

4 Id. 182 a; Shiells *v.* Blackburne, 1 H. Bl. 158.

5 Story on B. 175—186.

6 Id. 186 a, 186 b.

Duty to render accounts.

all losses however occurring.[1] A third duty is to render an account to the mandator.[2] The mandatary may not recoup his losses on one mandate from the profits to the mandator on another mandate; but he may deduct all necessary charges; and on restitution of the property, is bound to give up all increments and profits.[3]

Duties of the mandator.

286. The duties of the mandator are to reimburse to the mandatary all reasonable expenses incurred; to indemnify him for all proper incidental contracts entered into; to compensate him for all damages proximately resulting from the performance of the mandate, and of which it was the cause, and not the mere occasion.[4]

Cause and occasion of law distinguished.

Here, once for all, the cause of a loss will be distinguished from the occasion. If A gratuitously carries B's money from C to D, and undertakes the journey solely for this purpose, and is robbed, and loses also his own property, then B is liable to A for such money or other things belonging to A, as it was indispensable or proper for A to carry on the journey; for the journey was the cause of A's loss. But if A went upon the journey for his own business also, or carried money or things for his own pleasure or profit, then B is not liable for such losses, as the performance of the mandate was, in respect to them, the occasion, and not the cause. So, if there are two routes, one safe and the other dangerous, and A, without being required or necessitated, chooses the latter, and suffers loss, the mandate is the occasion and not the cause thereof.[5]

1 Story on B. 188; s. 154 I. C. Act.
2 Story on B. 191
3 Id. 192—194; s. 163 I. C. Act.
4 Story on B. 197—200, 242; s. 158 I. C. Act.
5 Story on B. 200.

287. Though the death of the mandatary dissolves the contract, which is a purely personal one, yet if it has been in part executed and loss might ensue, his representatives may be liable to complete it; generally, the death of one of joint mandataries dissolves the contract, unless the mandate was joint and several.[1] So, though the death of the mandator dissolves the contract, the mandatary may be bound to complete a partly executed mandate, if loss would otherwise ensue.[2] The rule is rather loosely laid down by Section 162 I. C. Act that a gratuitous bailment (which will include a deposit as well as a mandate) is terminated by the death either of the bailor or of the bailee, nothing being said as to the state of things at the time or the effect of a performance by the bailee after the fact, but without the knowledge of the death of the bailor. The English law adopts the rigid rule, that the death, though unknown to the mandatary, dissolves his authority to perform the mandate; the rule of the Roman law that makes the authority to cease only on knowledge of the death, is more equitable.[3] A change in the state of the parties, as the marriage of either party being a female, the insanity of either party, &c. will operate as a dissolution of the contract;[4] so there may be a revocation of the authority, which may be either express, or clearly implied; so if the authority of the mandator over the subject-matter has ceased, as by his no longer being a guardian, &c.[5] In an action for loss by negligence, the burden of proof will usually be on the mandator.[6]

Dissolution of mandate.

288. The next class of bailments is where the bailment

1 Story on B. 202.
2 Id. 204.
3 Id. 205.
4 Id. 206.
5 Id. 207—211.
6 Id. 212—217.

Second class of bailment.

COMMODATE.

is entirely for the benefit of the bailee. The first instance is a commodate, which is a loan of a chattel to be used by the borrower, without paying for the use of it, and to be returned *in specie*.[1] The essentials are, that there must be a chattel, or other personal property to be lent, that is, not merely deposited or sold;[2] a license to use real property, as a building, is not a commodate;[3] next, it must be lent gratuitously, as any compensation turns it into a hiring;[4] thirdly, it must be lent for use, and the use of the borrower; if for the joint use of the borrower and lender, it is no longer a loan; and the use must be the principal object of the contract, but the use need not be the most exactly appropriate one; thus, a chattel may be lent to be used as a pledge.[5] The use actually or impliedly agreed to, must not be exceeded. In the Roman law the commodate was always for a time certain, and where there was no time limited, the loan was said to be precarious, and the liability of the borrower was different. By the English law the time is not limited.[6] The fourth essential is that the identical chattel is to be returned; it is a loan for use, and differs from a *mutuum* or loan for consumption, where the same thing in kind is to be returned.[7]

Duties of borrower.

289. Lawful possession of, or a special property in, the chattel is a sufficient title in the lender; and he who has a special property, may thus lend the thing to the general owner.[8] The borrower has the right to use the thing as agreed upon, for any time

1 Story on B. 219—221.

2 Id. 223.

3 Woodman *v.* Joiner, 10 Jur. N. S. 852; S. C. nom. Williams *v.* Jones, 11 Jur. N. S. 843.

4 Story on B. 224.

5 Id. 225, 226.

6 Id. 227.

7 Id. 228.

8 Id. 230.

that may have been limited.[1] Generally, the use is a strictly personal favor, and he cannot allow another to use the chattel.[2] But if a horse is lent to A on trial, he will be justified in putting a competent person upon it to try it.[3] The first duty of the borrower is to take due care of the chattel; he is bound to use the amount of care prescribed by Section 151 I. C. Act. Loss by theft is not presumptive evidence of negligence.[4] Inevitable accident, or force, or robbery, &c., excuses from liability for loss; but then there must have been no imprudence or default of the borrower which exposed him to the calamity; this is on the distinction between the conduct of the borrower being the cause, or merely the occasion of the loss.[5] Fraud on the part of the borrower inducing to the loan, will render him liable for every loss that may occur.[6] There may always be a special contract to become liable for all losses.[7] But that a price or value has been fixed upon the thing when lent, is no proof of such a contract, unless the intention otherwise clearly appears.[8] By the Roman law when a commodate was precarious, the only liability was for gross negligence, but by the English law all commodates are precarious.[9] By Section 159 I. C. Act all commodates are precarious even though the loan was for a specified time or purpose; but subject in this case to the bailor compensating the bailee for loss from the sudden return. The borrower is liable for every loss during an improper use of the chattel beyond that agreed upon; so also if he is in default in returning it, and the thing be lost by accident or superior

1 Story on B. 231—3.
2 Id. 234, 235.
3 Camoys *v.* Scurr, 9 C. and P. 383.
4 Story on B. 237-9, 245—251, 253 c.
5 Id. 240-242 a.
6 Id. 243.
7 Id. 252; s. 152 I. C. Act.
8 Story on B. 253 a.
9 Id. 253 b, 258, 277.

force.[1] If not otherwise defined, the natural and ordinary use is that intended; and so the time, if not fixed, will be such as is reasonable for the object in view.[2] Ordinary expenses in using the thing are to be borne by the borrower, extraordinary ones by the lender.[3]

Duty as to restitution.

290. The second duty is as to the restitution of the thing; with any accessories or increments,[4] which should be after a reasonable time; but the lender, subject to compensating the bailee for consequent loss, may demand it before, or if the purpose of the commodate, though not the time has been accomplished.[5] The place for the return should generally be the residence of the lender, but much will depend upon the nature and use of the goods, as whether they are portable or not; any how the place must be a reasonable one.[6] A delivery to a proper agent of the lender will be sufficient.[7] Undue risk to the article should not be run in order that the return may be exactly punctual.[8] The borrower cannot retain the thing borrowed for any antecedent debt due to him.[9] If the lender is dead, or his state changed, as by insanity, &c., the return should be to his representative. Generally, the delivery should be to the lender though he is not the owner. This arises out of the general rule applicable to bailees, that a bailee cannot, of his own accord, set up the title of a third person, unless the bailor was a trespasser or thief in possessing himself of the goods, or the bailment was made by him with intent to defraud. But the bailee may show that the bailor's title has expired since the bailment,

1 Story on B. 254; ss. 154, 161 I. C. Act.
2 Story on B. 255.
3 Id. 256.
4 Id. 260; s. 163 I. C. Act.
5 Id. 257, 258; s. 159 I. C. Act.
6 Story on B. 261.
7 Id. 262.
8 Id. 263.
9 Id. 264.

or he may justify on the ground that the goods are the property of another who has demanded and received them, or forbidden their re-delivery; but this is at the risk of his being in the right.[1] So, if the bailor has subsequently mortgaged the goods, he has changed the situation of the bailee, and rendered the performance of his promise to re-deliver impossible.[2] In all bailments, the bailee, on the one hand, is not liable to the real owner if in good faith he returns the goods to a bailor without title; and the bailor without title, on the other hand, is liable to his bailee for any loss the bailee incurs from his bailor's want of title in dealing with the goods.[3] A return by one of several joint borrowers is a discharge of all, as a misuse by one is a misuse by all.[4]

Condition at time of return.

291. As to the condition of the thing when restored, the borrower is not responsible for deterioration not arising from his own fault or negligence. Where the injury amounts to a misfeasance or conversion, the lender may refuse to receive the thing back, and recover the full value of it in a suitable action; or he may receive it back, and have an action for the damages. So, he may recover any profits made by the improper use of the thing.[5]

Duties of lender.

292. The duties of the lender towards the borrower are, (1) to suffer the use as agreed upon, and not to do anything that may render the chattel less useful;[6] (2) to repay all extraordinary expenses duly incurred; and a subsequent entire loss of the thing by accident, or a restitution of it without demand of repayment,

1 Story on B. 265, 266, 281, 282.
2 European, &c. Co. v. Royal, &c. Co. 8 Jur. N. S. 136.
3 Ss. 164, 166 I. C. Act.
4 Story on B. 267.
5 Id. 268, 269.
6 Id. 271.

does not avoid this obligation;[1] (3) to give notice of such defects in the chattel, known to him, as might otherwise render the intended use of it perilous or unprofitable to the borrower;[2] and (4) where the thing has been lost and paid for by the borrower, and is then recovered by the lender, to restore either it, or the price paid to the borrower.[3] The possession of the borrower is, in law, the possession of the lender, who may sue for a trespass on, or conversion of his property; but the borrower has a possessory interest in the chattel sufficient, as against a wrongdoer, to enable him also to sue for a trespass or conversion.[4]

MUTUUM.

293. A *mutuum* differs from a commodate, as it is a loan of things that are fungible, or consumed in their use, where the borrower is bound to restore, not the same thing, but other things of the same kind. Consequently a delivery of the thing passes to the borrower, not a mere interest, but the absolute property therein; so that however the thing may subsequently be lost, the loss is that of the borrower, whose obligation to return the equivalent in kind remains as before. The lender may probably derive no profit, and so the transaction may be said to be gratuitous, but though usually classed among bailments, it seems, in effect, to be a sale, though by way of barter and not for money.[5] It seems doubtful if it falls within the definition of a bailment given in Section 148 I. C. Act.

294. The third and most numerous class of bailments is

1 Story on B. 273, 274.
2 Id. 273; see ante § 153; s. 150 I. C. Act.
3 Story on B. 276.
4 Id. 279, 280; Manders *v.* Williams, 4 Exch. 343; s. 180 I. C. Act.
5 Story on B. 283, 284; see South Australian I. Co. *v.* Randale, L. R. 3 P. C. 101.

Third class of bailments.

where the bailment is for the benefit of both parties; the first instance to be considered is that of a pawn or pledge. A pawn is where goods or chattels are delivered to one as security for money borrowed of him by the bailor: it is completed by delivery, and without delivery it would be an hypothecation only.[1] A pawn is defined in Section 172 I. C. Act to be the bailment of goods as security for the payment of a debt or performance of a promise. It is a peculiarity of English law that a mortgage, whether of personal or real property, is, in form, a conveyance of the right of property, to be at first conditional within the period fixed for repayment, but after that to be absolute;[2] but in truth, by the doctrines of the Equity Courts, the transaction is never viewed as a sale, but only as a transfer of the title by way of security for the loan; there may or may not be a transfer of the possession: still the speciality of the form greatly affects the English law of mortgages, and must always be remembered when using the term mortgage with reference to English law.

PAWNS.

295. Chattels, money, choses in action, shares, and any valuable thing of a personal nature, may be pawned.[3] The pledge need not be the property of the pledgor, and he is estopped from denying that he is the owner, so as to reclaim it without discharging the debt.[4] The pledgee is also ordinarily estopped to deny the pledgor's title to redeem, by setting up a right in another. Accessories and increments are pledged along with the principal thing, as the young of a flock of sheep.[5] Public pen-

What may be pledged.

1 Story on B. 286.
2 Id. 287, 288.
3 Id. 290.
4 Id. 291.
5 Id. 292.

sions and salaries are sometimes excepted on grounds of public policy, otherwise any property may be pledged.[1] But a pawn is confined to property of which there is present possession or title, or present vested interest, but there may be an hypothecation of property to be acquired, or to come into existence, in future.[2] One having a limited title may pledge property to the extent, and for the period, of his interest.[3]

Delivery.

296. The second essential is a delivery of the pledge, either actual, or constructive, as by transfer of a bill of lading, the key of a warehouse, &c. ; without delivery it is only an hypothecation, which, by English law, is void as against creditors except in one or two special instances.[4] Restitution of the pledge terminates the pledgee's title, unless the return was for a special purpose only. So also, if the pledgee voluntarily by his own acts places it beyond his power to restore the pledge, it is a waiver of his own interest, as where he agrees to let it be attached at the suit of another.[5] Thirdly, the pledge must be by way of security for some debt or engagement, which may be either future or past, express or implied, and of any nature. Generally, the security is for the whole and every part of the debt or engagement.[6] Hence if the debt or engagement as security for which the pledge is made, be immoral or illegal, the contract is vicious and the pledgor cannot recover.[7]

Must be as a security.

1 Story on B. 293. Some pensions may be assigned; on this subject, see Ryall *v.* Rowles, 2 L.C. in Eq. 678; Collett on Injns. 34; Heald *v.* Hay, 8 Jur. N. S. 437 ; Carew *v.* Cooper, 10 Jur. N. S. 420.

2 Story on B. 294.

3 Id. 295.

4 Id. 297, 298.

5 Id. 299.

6 Id. 300, 301.

7 Taylor *v.* Chester, L. R. 4 Q. B. 309.

Rights of the pledgee.

297. As to the rights of the pledge; (1) he has a possessory interest, and a right to the exclusive possession, as well against the pledgor as a stranger;[1] but the pledge is confined to its proper debt, unless there is some just ground to presume an intention to extend the security to other engagements; it includes, though, security for subsequent advances and for interest, and for such incidental charges and expenses in respect of the possession or for the preservation of the goods pledged, as are necessary and not merely useful, including also extraordinary expenses incurred for the preservation of the goods.[2] (2) He has a right, on default in the pledgor, to sell the pledge, and where no time for payment of the debt has been fixed, this he may do upon due demand and reasonable notice to the pledgor.[3] He may bring a suit for the sale, or he may sell upon his own motion after notice to the pledgor, and if the sale be fair and reasonable, it will be as obligatory as a judicial sale. It should then be at public auction; but the safer course is to have a judicial sale.[4] Herein a pawn is distinguished from a lien, as a pawn implies that the security shall be made effectual to discharge the debt, but a lien is a mere right of detention.[5] But a pledgee cannot sell more than is sufficient for his debt, where the pledge is divisible.[6] The surplus proceeds of a sale go to the pledgor, and any deficiency remains as a personal charge against him. A pawn being only a collateral security, the right to sue personally for the debt is not suspended.[7] But a sale is the only way of enforcing the security; the pledgee is not allowed to appropriate the

1 Story on B. 303, 307.
2 Id. 304—306 a; ss. 173, 174, 175 I. C. Act.
3 Id. 308; s. 176 I. C. Act.
4 Story on B. 310.
5 Id. 311.
6 Id. 314.
7 Id. 315; s. 176 I. C. Act.

pledge; a special contract to prevent the pledgor having a right to redeem would be void as against public policy.[1] At the sale, the pledgee is not allowed to become the purchaser.[2] It seems that the pledgor might sue to compel a sale where the pledge is perishable, or the refusal to sell is inequitable.[3]

298. A pledgee may alienate to another his own interest in the pledge, or he may assign a less interest, but he cannot pass a greater, though where the pledge consists of bank notes or negotiable securities passing as money by delivery, the pledgor would have no remedy against *bonâ fide* purchaser, without notice, from the pledgee.[4] The rule of English law, till altered by statute, was that a factor, unless suffered to appear as real owner, could only expressly and to the extent of his lien, pledge goods by indorsing a bill of lading; otherwise the transfer was wholly tortious, and the owner recovered without allowing for what he owed the factor for advances.[5] But this rule was not recognized by other laws; and a factor or other person having a limited interest is able to pledge goods to the extent of his lien upon them, whether he does so expressly or not.[6] Now by Section 178 I. C. Act advances made in good faith on pledge to persons entrusted with the possession of goods, or the documents of title thereto, though known to be agents, are protected, if the circumstances do not raise a presumption that the pledgor is acting improperly, or if the possession of the goods or documents has not been obtained by an offence or fraud. The test of good faith is, were the circumstances such that a reasonable man, and a man of business, applying his understanding to them,

Right to assign.

1 Story on B. 318.
2 Id. 319.
3 Id. 320.
4 Id. 322-4.
5 Id. 325.
6 Id. 328; s. 179 I. C. Act.

would certainly infer that the agent had not authority to make the pledge, or that he was acting *malâ fide*, in respect thereof, against his principal.[1] It has recently been held in England that the repledging or sale for a larger sum than that due on the first pledge does not put an end to the contract between the pledgor and pledgee, but the former before he can recover the thing pledged must tender what is due from himself; the contract of pledge differing from that of simple lien where all that is given is a right of retention.[2] Under the factor's Act there may be successive pledges by a factor until the full value of the goods is reached.[3] But the pledgor must be a factor or agent, who in the ordinary course of such agency sells or pledges goods; if, in truth, he was only a servant without authority to pledge, or if the goods were intrusted to him as warehousekeeper, and not as factor or broker, the pledge will not be protected, whatever the *bona fides* of the pledgee.[4] So where the goods are wrongfully retained after the authority to sell or keep the goods as factor has been revoked, the power to make a valid pledge is gone.[5] An isolated employment may constitute a factor within the Act.[6]

Right to use.

299. As to the pledgee's right to use the pawn, if the use is necessary, or beneficial, or a matter of indifference, or there are charges in keeping, then the use is indispensable, or allowable as the case may be. If the pawn would be the worse for use, it is not allow-

1 Gobind C. S. *v.* Ad.-Gen. Bengal, 8 Jur. N. S. 343; Shepherd *v.* Union B. id. 265.

2 Donald *v.* Suckling, L. R. 1 Q. B. 585; Halliday *v.* Holgate, L. R. 3 Exch. 299.

3 Portalis *v.* Tetley, L. R. 5 Eq. 140.

4 Lamb *v.* Attenborough, 8 Jur. N. S. 280; Cole *v.* N. W. Bank, L. R. 9 C. P. 470, and 10 C. P. 354.

5 Fuentes *v.* Montes, L. R. 4 C. P. 93.

6 Hayman *v.* Flewker, 9 Jur. N. S. 895.

ed; so if the use will be attended with the risk of loss, then it will be at the peril of the pledgee.[1]

300. Next as to the duties of the pledgee; he is bound to use ordinary diligence, as defined in Section 151 I. C. Act. The rule as to liability on loss by theft has been stated before; proof of want of ordinary diligence inducing such loss, is required.[2] Next his duty is to return the pledge with its increments and profits; he may make the return to the real owner, but at his peril that his pledgor had no special property in the pledge.[3] After due tender by the pledgor, and refusal, the pawn remains at the absolute risk of the pledgee.[4] The third duty is to account for the income and profits, but he may set off all necessary costs and expenses; if there is an implied obligation to employ the pledge at a profit, as for example a ferry-boat at a ferry, he must account for the income lost by his negligence.[5] There may be a pledge in which the debt is to be discharged by means of the income.[6]

Duties of pledgee.

301. The pledgor has always the right of redemption, and any clause in the agreement against redemption is void as against public policy, but there may be a subsequent agreement waiving the right to redeem.[7] The law of limitations would, on principle, not run against the right to redeem, since the possession of the pledgee is not adverse, and the right to redeem passes to the representatives of the pledgor;[8] but by the Limitation Act of 1871 the pawnor must sue within 30 years from the date

Rights of the pledgor.

1 Story on B. 329—31.
2 Id. 332—8.
3 Id. 339, 340; s. 163 I. C. Act.
4 Id. 341; s. 161 I. C. Act.
5 Story on B. 343.
6 Id. 344.
7 Id. 345.
8 Id. 346—9; s. 177 I. C. Act.

of the pawn, or of some prior acknowledgment of his title signed by the pawnee or person claiming under him. So, on the other hand, though the pledgee's right to sue for the debt may be barred by the law of limitations, his right to retain the pledge is not extinguished by the lapse of time, and the pledgor cannot recover without paying the debt. The pledgor has a right to sell his interest in the property subject to the interest of the pledgee.[1] He may also recover damages for any loss from the default of the pledgee.[2] He, as well as the pledgee, has a right of action against a stranger for trespass or conversion; but a recovery by either will bar a suit by the other; unless the pledgee only recovered the amount of his debt, and then the pledgor may sue for the surplus.[3] The pledge is not liable to be taken in execution in an action against the pledgor, unless or until the pledgee's title is determined.[4] The pledgor impliedly warrants his title to the pledge, and will be liable to the pledgee for any loss by reason of his interest having been defective.[5] He is also bound to reveal any latent defect diminishing its value, and is liable for any fraudulent representation of the nature or quality of the pawn.[6] He is also bound to repay the pledgee all necessary expenses incurred, but not those which were merely useful.[7]

Liability of pledgor.

302. The next instance of the third class of bailments is the important group of bailments for hire. A location, or bailment for hire, may be defined as a contract by which the temporary use of a sub-

Bailments for hire.

1 Story on B. 350.
2 Id. 351; s. 161 I. C. Act.
3 Id. 352; ss. 180, 181 I. C. Act.
4 Story on B. 353.
5 Id. 354; s. 164 I. C. Act.
6 Story on B. 355, 356.
7 Id. 357, 358; ss. 173, 175 I. C. Act.

ject, or the work or service of a person, is given for an ascertained hire.[1] The subject may be divided into, 1, the hire of things, in which it is the thing which is hired, and the bailor who is paid; and 2, the hire of service, in which it is the service which is hired, and the bailee who is paid:[2] this latter head may be again divided into, (1) the hire of service to be done upon a thing; (2) the hire of service in the custody of a thing; and (3) the hire of service in the carriage of a thing.[3] The employer is, in these latter cases, the letter of the work, but the hirer of the service or labour; while the person employed is the letter of the service, but the hirer of the work to be done.[4]

General essentials.

303. The general essentials of bailments for hire are, (1) a thing in existence to which the contract can attach;[5] (2) a thing capable of being hired; it should be some moveable property, but there may be a bailment for hire of choses-in-action and securities, at least as to the carriage of them;[6] (3) a right in the bailee to use the things for an ascertained purpose and time; a use at the mere will of the bailor would be valueless; but the use and time may be implied;[7] (4) a price or compensation to be paid, otherwise it will be a gratuitous loan; the price should be certain or capable of certainty, but need not be express, it may be tacitly implied, as the usual hire of such labor, or a reasonable hire; and it need not be a pecuniary compensation;[8] and (5) there must be a legal obligation attaching, that is, it must be a bailment not opposed to sound morals or public policy;[9] the parties

1 Story on B. 368.
2 1 Sm. L. C. 166.
3 Story on B. 370; 1 Sm. L. C. 166.
4 Story on B. 369.
5 Id. 372.
6 Id. 373.
7 Id. 373, a.
8 Id. 374—7.
9 Id. 378, 379.

must be competent to contract; thus, a minor, though liable for torts not connected in any sense with contracts, as for assault, libel, fraud, is not liable for torts arising out of contracts, since he is not liable on the contracts; and hence he could not be sued in tort if he hired a horse and rode it immoderately, for he could not be sued on the contract; but if he went beyond his contract, as by riding the horse elsewhere than agreed on, he would be guilty of a tort:[1] lastly, there must be a consent in the same matter, that is, no fraud or substantial mistake.[2]

HIRE OF THINGS.
Duties of letter.

304. In the hiring of things, the letter is bound to deliver the thing, with its proper and customary accompaniments, at his own expense, at the place where the thing is, at the time specified, and in as good a state as when the contract was made.[3] He is bound not to obstruct the use, or to do any act, as selling it, to deprive the hirer of the thing.[4] He impliedly warrants that he was entitled to let the thing, and to transfer a right of possession to the hirer.[5] He is also bound to keep the thing in order and repair suitable for the purposes of the bailment; but this will be affected by the usages of trades, &c. The letter is, however, never liable for expenses incurred which were not necessary, though they might be useful.[6] So, he warrants against defects such as would prevent the due use, and substantial enjoyment of the thing.[7] If faults dangerous to the hirer are concealed, the letter will be liable for all damages resulting therefrom,[8] and it is immaterial that the letter

1 Story on B. 380; Barnard v. Haggis, 14 C. B. N. S. 45; 9 Jur. N. S. 1325; ante § 7, a.
2 Story on B. 381.
3 Id. 384, a.
4 Id. 385, 386.
5 Id. 387; s. 164 I. C. Act.
6 Story on B. 388, 389.
7 Id. 390, a.
8 Id. 391, a; s. 150 I. C. Act.

was in fact unaware of any defects. It seems that the relation between a cab owner and the driver is that of bailor and bailee, and that the former is liable to the latter for damage from a horse not reasonably fit for use.[1] The Roman and some other laws treat leases of real estates as bailments on hire, and the lessor, in the absence of contract, is bound to repair; the English law does not include leases among bailments, and the general rule is that the tenant is bound to repair;[2] the usage in India is generally that the lessor repairs.

Rights and duties of hirer.

305. The hirer has a special property in the thing, so that he may sue a wrongdoer.[3] A creditor of the bailor cannot attach the property, and take it from the custody of the bailee.[4] If the hirer so misuse the thing that the bailor is entitled to treat the bailment as determined, yet the bailor may not seize the thing by force, though he may, if he can, re-possess himself of it peaceably.[5] The hirer is bound to use ordinary diligence such as all prudent men use.[6] He is also liable for the defaults of his children, guests, servants, and sub-agents; but the act must be done by the servant in the course of his employment, although it may be that the act was in disobedience to the master's orders; but he is not liable where the servant did the act wantonly and maliciously.[7] What constitutes the relation of master and servant has been before considered.[8] By the English law, it seems to lie upon the letter to prove that a loss was due to the negligence of the hirer; the rule, in most other laws, is that the

1 Fowler *v.* Lock, L. R. 7 C. P. 272, and 10 C. P. 90.
2 Story on B. 392.
3 Id. 394; s. 180 I. C. Act.
4 Story on B. 395.
5 Id. 396; s. 153 I. C. Act.
6 Id. 398, 405—9, 412; s. 151 I. C. Act.
7 Story on B. 400—4.
8 Ante § 119—122.

hirer is bound to prove that the loss was without any default on his part; and this seems the more reasonable rule.[1]

306. The use must be that only for which the thing was hired; a saddle horse must not be used in a cart. A misuser, or for a longer period than agreed, will make the hirer liable for damages, and generally for any subsequent loss though from inevitable accident.[2] Possibly if the subsequent loss must inevitably have happened whether there had been a misuser or not, the hirer might be excused, but only on clear proof, the burden of which will be on him.[3] A return of the thing to the wrong person will be a conversion by the hirer.[4] If the letter has, during the bailment, sold or mortgaged the thing, the hirer may be justified in refusing to return it to him.[5] Any damage caused by negligence must be paid for, though the thing is afterwards entirely lost by inevitable accident.[6] Where there has not been any use or enjoyment of the thing as stipulated for, without any default on the part of the hirer, no hire is payable; and where, in like manner, there has been only a partial use, the hire payable is, by most laws, equitably proportioned to the degree of enjoyment; but it is doubtful, if, by the English law, any hire would then be due.[7]

Liability of hirer.

307. In the hire of labor to be employed upon a thing, it is a bailment when the thing is the property of the employer, but if it is the property of the employed, then it is a sale; but the bailment is not altered by the workman using some his of own materials

HIRE OF LABOR.

1 Story on B. 410, 411, 454; s. 106 Indian Evid. Act.

2 Id. 413; ss. 154, 161 I. C. Act.

3 Story on B. 413—418; Davis *v.* Garrett, 6 Bing. 716.

4 Story on B. 414; s. 166 I. C. Act.

5 Ante § 290; s. 164 I. C. Act.

6 Story on B. 414.

7 Id. 417; Cutter *v.* Powell, 2 Sm. L. C. 1; ss. 54, 65 I. C. Act.

in the repair of the thing.[1] If the thing is destroyed by accident, without default of the workman, before the completion of the work, the rule is that the property is lost to the owner, and, in the case of a bailment, he must pay a proportion of the hire, and for the materials added.[2] In the case of a sale, the loss falls upon the workman. In a bailment, if the hire was to be for the entire job, and it was not complete when the thing perished, the workman loses his hire.[3]

308. The bailee may do the work by means of others, except where his own personal skill is of the essence of the bailment, as would be the case with an artist.[4] The time fixed for its completion is, generally, of the essence. He undertakes for reasonable skill in the planning and execution of the work, but he is not liable for loss arising from inherent defects in the thing.[5] He is bound to ordinary diligence in keeping it, and this is measured by the nature and value of the thing.[6] If, by belonging to a particular profession or trade, he profeses to have skill in the business, he is bound to perform it in a workmanlike manner. Not only his labor, but his judgment, has been hired. The degree of skill is in proportion to the value, delicacy, and difficulty of the operation ; still ordinary skill for such work, and not the highest (which may belong to only a few), is required.[7] It is the bailor's own fault if he employs one known not to have the requisite skill; from such, a reasonable exercise of such skill as he has, is alone required.[8]

Liability of the bailee.

1 Story on B. 423.

2 Id. 426, 427 ; Menetone v. Athawes, 3 Burr. 1592.

3 Story on B. 426 B, 427 a, 437—9.

4 Id. 428 ; s. 40 I. C. Act.

5 Story on B. 428, a.

6 Id. 429, 430 ; s. 151 I. C. Act.

7 Story on B. 431—4.

8 Id. 435.

309. The bailee is liable for non-feasance as well as misfeasance; it is otherwise with a mandatary.[1] He is also bound to good faith as to the quality or quantity of his work, but he has a particular lien, when the work is done, for his hire, &c.[2] Where the right of lien is exercised, it is a general rule that the expenses incurred in keeping the chattel, are not recoverable.[3] By Section 171 I. C. Act, bankers, factors, wharfingers, attorneys of a High Court and policy brokers are now the only persons who, in the absence of an express contract, have the right of a general lien, that is, the right to detain particular goods for a general balance of account due from the same party.[4] By English law a right of general lien must have been judicially recognised, or be strictly proved by express evidence of custom.[5] It seems now settled, that if the work is left incomplete by default of the workman, he can recover nothing: if the contract was rescinded, or not completed from inevitable accident, then he will have a proportionate compensation, or if the default was in the employer, then the full compensation or hire. Where the work has been done so badly that the thing is of no use whatever, nothing is recoverable, but if it is still of some use, then a reasonable amount. If the work is well done, but not within the time, then the special damage is to be deducted.[6] Where superior materials or extra labor have been used beyond the stipulations of the contract, nothing extra is recoverable, unless in some way the employer acquiesced therein.[7]

Right of lien.

Payment of hire.

1 Story on B. 436.
2 Id. 440; s. 170 I. C. Act.
3 British, &c. Co. *v.* Somes, 27 L. J. 397 Q. B.; 6 Jur. N. S. 761.
4 The leading case in English law is Chase *v.* Westmore, Tudor's L. C. on Merc. L. 575.
5 Id. 582, 593.
6 Story on B. 441—441, b.
7 Id. 441, c.

310. Next, the bailment may be for the custody of a thing for hire; such are agistors of cattle, who receive them for custody. They are liable for ordinary negligence, such as leaving gates open, whereby cattle stray, or are stolen; or placing a horse among horned cattle whereby the horse is hurt.[1] They have such a possession that they may sue a wrongdoer for trespass or conversion. They must have a reasonable skill in their business, and it would seem that they would have a particular lien for their hire[2] a livery stablekeeper has no lien for the keep of a horse, but then his contract is to deliver the horse at pleasure.[3] Where a livery stablekeeper undertakes the care of a customer's carriage, he is a private bailee for reward, and is bound only to ordinary and reasonable diligence.[4]

HIRE OF CUSTODY.

Agistors of cattle.

311. A warehouseman is responsible for ordinary diligence. If goods are destroyed by rats, &c., he is not liable, provided he took ordinary precautions. Those who receive goods to forward are warehousemen.[5] The liability of a warehouseman begins as soon as the goods arrive, and the crane of the warehouse is implied, though they may be injured before they get inside.[6] The liability of a common carrier, and a warehouseman are very different, though often the same man acts in both characters. When goods have arrived at their destination, and are placed in the warehouse for the convenience of the consignee, the greater liability as a carrier ceases; still a carrier is bound to

Warehousemen.

1 S. 151 I. C. Act; Smith v. Cook, 1 Q. B. D. 79.

2 Story on B. 443, 453, a; but see L. C. on Merc. Law, 590; s. 170 I. C. Act.

3 Judson v. Etheridge, 1 Cr. & M. 743.

4 Searle v. Laverick, L. R. 9 Q. B. 122.

5 Story on B. 444.

6 Id. 445.

keep goods for a reasonable time at his own risk as such, till the consignee can remove them.[1] There may be a usage for the carrier to deliver the goods, and if so, till then, they are at his risk as such, though placed in his warehouse.[2] A warehouseman is responsible even for the innocent mistakes of his servants in delivering goods to the wrong person.[3] He cannot dispute his bailor's title, but it seems that after notice from a third person, he acts, either in making or refusing a delivery, at his own peril, and is only protected if he acted in good faith in returning them to his bailor.[4] When the goods are spurious, and he has notice from the person injured not to part with them, as an injunction is going to be applied for, he will be justified in refusing delivery to the bailor.[5] He is liable for damage by negligence, even though there is a subsequent total loss, for which he is not liable. So, after neglect to deliver he is liable for any loss any how.[6] The bailor is liable, if, being aware of the dangerous nature of the goods, he leaves the bailee in ignorance thereof.[7]

312. Wharfingers. A wharfinger is not distinguished from a warehouseman.[8] Usage chiefly fixes when his liability begins and ends; a delivery to the proper officers of the vessel, though the goods remain on the wharf, ends it; a mere delivery on the wharf, without some act of assent by the wharfinger, does not begin it. He has a lien for wharfage, but after a sale by the owner, only for the debt due at the time of the notice of sale.[9] He has by Section 171 I. C. Act a general, and not merely a particular,

1 Story on B. 446—9; Hyde *v.* Trent N. Co. 5 T. R. 389; Taff Vale Ry. Co. *v.* Giles, 2 E. & B. 823.
2 Story on B. 447.
3 Id. 450; ss. 160, 161 I. C. Act.
4 Id.; s. 166 I. C. Act.
5 Hunt *v.* Maniere, 11 Jur. N.S. 28.
6 Story on B. 450 a; s. 161 I. C. Act.
7 Farrant *v.* Barns, 8. Jur. N. S. 868; see ante § 153; s. 150 I. C. Act.
8 Story on B. 451, 452.
9 Id. 453.

lien. If he has refused delivery under one plea, as under a claim of property in the goods, he cannot afterwards justify the detention under a right of lien.[1] So, it is a general rule, that there can be no lien in respect to a right inconsistent with the purpose of the bailment; thus, a policy of insurance deposited for safe custody, cannot be retained under a claim of lien for an antecedent debt.[2]

313. Factors, to whom goods are delivered for sale or otherwise, are more properly ranked as agents; but in one view of their position they are bailees, and their liability to their principals for torts may here be noticed. They are bound to exercise reasonable skill, and ordinary diligence in the custody of goods;[3] hence they are not liable for loss by theft, robbery, fire, &c., unless connected with their own negligence. They are liable if they disobey their instructions, but on emergency,[4] and in case of necessity, they may act contrary to the general tenor thereof, if applicable only to ordinary circumstances. But good faith alone does not excuse; there must have been reasonable skill and care in their conduct. Known usages of trade must be followed when for the benefit of the principal; so a breach of duty in not keeping separate accounts of their own and their principal's transactions, or in depositing the money of their principals in their own name, may render them liable for consequent loss; so, where ordered to insure, if they negligently omit to include the ordinary risks, or negligently or wilfully conceal a material fact, or affirm a false fact, whereby the policy is avoided, they will be liable. But they are not bound to suggest

Factors and agents.

1 Boardman *v.* Sill, 1 Camp. 410.
2 Brandao *v.* Barnett, 12 Cl. & F. 787.
3 S. 151 I. C. Act.
4 S. 189 I. C. Act.

wise precautions against loss by accidents; but it seems that they may insure goods, not only for their own benefit, but also on behalf of their principal.[1] The liability of public agents is different from that of private agents; thus, a postmaster is not liable for losses by the negligence or delinquency of a clerk or other subordinate but the clerk alone is liable. Still the postmaster will be liable for neglect of ordinary diligence in superintending his subordinates, resulting in loss.[2] An action lies against a postmaster for not delivering a letter on request, though no special damage accrued.[3]

Public agents.

314. An Innkeeper, though he has the custody of his guest's goods, is not an ordinary bailee for hire, but his duties and rights are, as in the case of a common carrier, consequent upon the public profession which he exercises. Like a common carrier he is, with certain qualifications, bound to deal with all who come to him, and his liability to any particular customer arises from and rests upon the custom of the realm, though the extent of his common law liability has been limited by special enactment. An Innkeeper does not seem to be within the terms of Section 148 I. C. Act, and in England by the 26 & 27 Vict. c. 41, the amount for which he is liable, is limited to a certain sum, except where property is lost or injured by the wilful neglect of himself or his servants, or there has been an express deposit of it with him.[4] Otherwise it is not necessary to prove that the goods were in his special

Innkeepers.

1 Story on B. 455, 456; Story on Ag. 188-199; ss. 211, 212, 213 I. C. Act.

2 Story on B. 461-3; Story on Agency, 319, 320, and see ante § 116.

3 Edwards v. Dickenson, 12 Mod. 6.

4 The leading case on innkeepers is Calye's case, 1 Sm. L. C. 87.

keeping; it is generally sufficient that they were in the inn under his implied care.[1] There is a presumption of negligence from loss, but it is rebuttable; and he may prove personal negligence in the guest, or loss from inevitable casualty, or irresistible force (as that of an armed mob), or by fire without negligence, or by robbery or burglary by persons from without the inn.[2] He may show that the guest was robbed by his own servant or companion; but he cannot plead his own illness or absence.[3]

What is an inn.

315. An inn is a public house of entertainment for all who choose to frequent it, and where the traveller is furnished with everything he has occasion for while on his way; there need be no sign: but a coffee or eating-house, or an ordinary choultry in India, is not an inn; nor is a private boarding or lodging house, and the liability of the keeper of such is not that of an innkeeper;[4] the law, as has been recently decided, imposing no obligation upon a lodging house keeper to take care of the goods of his lodger; there is not any bailment of the goods to the keeper of lodgings as to an innkeeper; nor is there any such general duty (as was once thought), as to exercise the care of a prudent householder. The law is, that the lodger has to take the same care as to his own property while in his lodgings, that he does when walking about the streets; and the letter of lodgings is under no liability for the goods of the lodger, though they may be stolen by the former's own family or servants.[5] An innkeeper need only furnish rooms for lodging, and not for

1 Story on B. 471; Day v. Bather, 9 Jur. N. S. 444.
2 Story on B. 472.
3 Id. 473.
4 Id. 475.
5 Holder v. Soulby, 6 Jur. N. S. 1031.

showing goods or other purposes. He may refuse a guest who is disorderly or noisy, or turn him out. He has a lien for the cost of lodging and food, on all the goods brought in by a guest which he does not know belong to another;[1] and if the guest has reason, and is not a minor, and there is no fraud, he need not consider the extent of things ordered by the guest. When he receives a horse as innkeeper, he has a lien for his keep, though the owner lodges elsewhere.[2] There is no lien on the person of a guest.[3] A guest cannot insist on having a particular room, or on putting it to other than its proper use.[4] A neighbour or friend staying gratuitously is not a guest. An agreement for board by the week does make the guest a boarder, if still in reality a traveller, and the length of his stay is immaterial; but if one comes on a special contract to board and sojourn at an inn, then he will be a boarder. There is no lien on the goods of a boarder.[5] A lodging housekeeper may, by way of distress for rent, detain the goods of his lodger until the rent is paid.[6]

Liability of an innkeeper.

316. An innkeeper is liable for all goods brought within the inn, and a delivery at the usual place, though not absolutely inside the inn, is sufficient. An express delivery or notice from the guest is not needed. It is no excuse that a key was given to the guest with which to lock his door, and his not locking his door is not always, though it may be such negligence as to excuse the loss of things stolen; but there may be a special notice to him to keep his goods in a certain room; the usage of an inn to keep

1 Snead v. Watkins, 26 L. J. 57 C. P.; Threfall v. Borwick, L. R. 7 Q. B. 711 and 10 Q. B. 210.

2 Story on B. 476; Allen v. Smith, 9 Jur. N. S. 230, 1284.

3 Story on B. 476 a; Sunbolf v. Alford, 3 M. and W. 248.

4 Story on B. 476.

5 Id. 477.

6 Cramer v. Mott, L. R. 5 Q. B. 357.

certain things in a certain room, will not bind the guest, unless actual knowledge is shown.[1] The liability includes choses in action, and money, and is not limited to such money or goods as it is necessary, or usual for a traveller to have.[2] The burden of showing non-liability is on the innkeeper; he may show that the guest retained exclusive custody of the goods, and was very negligent, or that he used the room for other purposes, as for a show room, and had exclusive charge of it, or that he expressly desired his property to be kept in a particular exposed place, or that he was otherwise negligent in exposing his property; or did not use that ordinary care that a prudent man would take under all the circumstances.[3] A guest's room is generally the proper place for his goods; but that he selected a particular room does not exonerate the innkeeper.[4] The goods must have been received in the character of an innkeeper; otherwise the liability is that of an ordinary bailee.[5] If a guest has left the inn, but by mistake left something behind, the innkeeper is liable for its custody only as a common bailee.[6]

HIRE OF CARRIAGE OF THINGS.

317. In the hiring of service in the carriage of things, the bailee is bound only to the exercise of ordinary diligence, and is in the same position as an ordinary bailee for hire for the custody of things. But the liability of a professional or common carrier is much greater.[7] By the English common law he is liable for all losses, except those by the act of God, or public enemies;

1 Story on B. 478—80; Oppenheim *v.* W. L. Hotel Co. L. R. 6 C. P. 515.

2 Story on B. 481; 1 L. C. Sm. 90.

3 Cashill *v.* Wright, 6 E. and B. 891, 900; Oppenheim *v.* W. L. Hotel Co. L. R. 6 C. P. 515.

4 Story on B. 482-4; Burgess *v.* Clements, 4 M. and S. 306.

5 Story on B. 487.

6 2 Hilliard, 539.

7 Story on B. 457-9.

and excepting also those arising from the inherent defects or tendencies of the thing. This liability was founded on public policy, to prevent collusion with robbers, &c., and at present it is greatly controlled by express enactment.[1] By the Roman and some other laws, the liability was never quite so great.[2] The rights and liabilities of inland common carriers in India are now regulated by Act 3 of 1865; but only partially so, as their ordinary liability is not defined or affected in all cases, for instance in respect to articles not enumerated in the Act, and as to which no special contract has been made with the sender; and hence in the absence of express law, the rules of the English common law would probably be followed in India, except when the rules of the I. C. Act may be applicable to the particular case.

Who is a common carrier.

318. To make a man a common carrier, his employment must be habitual; it must be a public business, so that he would be liable for a refusal to carry. One undertaking jobs for special bargains, and not professing to carry generally, is not a common carrier.[3] The definition in Act 3 of 1865 is, "a person engaged in the business of transporting for hire property from place to place by land or inland navigation for all persons indiscriminately." A hackney coachman, or cabman plying for passengers is not such.[4] A general ship or boat carrying goods for all who offer, is such, but not where the letting is to particular individuals on specific contracts; and similarly one who removes household furniture on special contract on each occasion, is not a common carrier.[5] Common carriers

1 Story on B. 489, 93, 507, 507, a.

2 Id. 459, 488.

3 Story on B. 495, 500; Brind v. Dale, 2 M and Rob. 80.

4 Story on B. 498; Ross v. Hill, 2 C. B. 877.

5 Nugent v. Smith, 1 C. P. D. 433 commenting on Liver Alkali Co. v. Johnson, L. R. 9 Exch. 338; Scaife v. Farrant, L. R. 10 Exch. 358.

Passenger's luggage.

are so, either (1) by land, or (2) by water. As to passengers, the liability of carriers is different; but in respect to the luggage of their passengers, the liability is that of common carriers, though no special charge is made for luggage; but luggage does not include merchandise or valuables carried for sale, &c.; what is reasonable from the position of the passenger and the journey he is upon, will be deemed luggage; thus, a reasonable amount of money for use, a watch, a pair of pistols, &c., have been held to be luggage, but not a trunk of laces, silks, or samples of merchandise.[1] Where porters are employed by a railway to discharge the luggage on arrival, the liability continues till the duty is done by placing it in the passenger's cab or coach.[2] Luggage in the carriage, if placed there with the knowledge and assent of the company's servants, is in the custody of the company;[3] but their liability is much modified thereby, and the passenger is bound to take ordinary care of it.[4] Where a servant takes his master's luggage as his own, the master cannot sue for its loss.[5] Where luggage is carried free, but merchandise should be paid for, if a box, obviously containing merchandise but carried as luggage, is lost or stolen, the carrier is not liable; and the acceptance of the box by the carrier's servant in violation of the rule, does not alter the carrier's contract.[6] It would be otherwise if the carrier himself had notice or knowledge that the box

1 Story on B. 498—9; 2 Kent's Com. 811; Phelps *v.* London, &c. Ry. Co. 11 Jur. N. S. 652; Macrow *v.* G. W. Ry. Co. L. R. 6 Q. B. 612.

2 Richards *v.* L. &c. Ry. Co. 7 C. B. 839.

3 G. N. Ry. Co. *v.* Shepherd, 8 Exch. 30; Le Conteur *v.* L. and S. W. Ry. Co, L. R. 1 Q. B. 59.

4 Talley *v.* G. W. Ry. Co. L. R. 6 C. P. 44.

5 Becher *v.* G. E. Ry. Co. L. R. 5 Q. B. 241.

6 Belfast Ry. Co. *v.* Keys, 8 Jur. N. S. 367.

contained merchandise, and accepted it as luggage. That the box is marked outside, "glass," does not amount to such notice.[1] Such articles as children's play things are not ordinary or personal luggage.[2] Only the owners of general ships, that is, of such ships as are open to carry for freight, goods which any one puts on board, are common carriers by sea.[3] Act 3 of 1865 does not apply to common carriers by sea; but as to the liability of owners of sea going ships, the Merchant Shipping Acts 17 & 18 Vict. c. 104, s. 503, and 25 & 26 Vict. 63, s. 54, may be consulted. That no sum is fixed for the hire is not material, for a reasonable hire is then due.[4]

Duty to receive and carry.

319. A common carrier is bound to receive goods from any one ready to pay a reasonable hire, and a tender of the hire is not needed.[5] He may not raise his rates to different persons; but he may object that the goods are not such as he carries, or that he has no room.[6] The directions of the owner must be obeyed, and when required, there must be a re-delivery to the consignor. He is bound to use exact diligence, safely and securely to carry the goods to their place of destination, and there deliver them in a reasonable time, and a reasonable manner. In case of carriage by sea there must be no deviation from the voyage, or the carrier will be liable even for subsequent losses by inevitable casualty.[7]

320. A common carrier is liable for losses by the wrong-

1 Cahill *v.* L. & N. W. Ry. Co. 7 Jur. N. S. 1164; 8 Jur. N. S. 1063.

2 Hudston *v.* M. Ry. Co. L. R. 4 Q. B. 366.

3 Story on B. 501; Nugent *v.* Smith, 1 C. P. D. 433.

4 Story on B. 505; Ashmole *v.* Wainright, 2 Q. B. 837.

5 Pickford *v.* Grand, J. Ry. Co. 8 M. & W. 572.

6 Story on B. 508; Johnson *v.* Midland Ry. Co. 4 Exch. 367.

7 Story on B. 509.

Liability.

ful acts of strangers, as well as those of his own servants, or arising from his own negligence.[1] The only exceptions are losses by the act of God, that is, from natural but extraordinary accident which cannot be guarded against by the ordinary exertion of human skill and diligence;[2] and by public enemies, that is, those with whom the nation is at war, and not mere robbers; but pirates are public enemies.[3] In the absence of negligence he is also not liable for damage the result of inherent defects or vices in the things carried.[4] But a carrier may limit his liability by means of special contracts or conditions; if these are shown to have been brought to the knowledge of the consignor, and he does not dissent, he is by English law assumed to assent to them: and this may be by a notice on a ticket delivered to the consignor, or by exceptions contained in a bill of lading.[5] But inland carriers in India cannot limit their ordinary liability as to articles not enumerated in the Act, by mere public notice; there must be a special contract signed by the owner of the property or some duly authorized person on his behalf.[6] There have been numerous decisions on the proper meaning of the usual terms in a bill of lading, but it will not be profitable here to enumerate them.[7]

321. As to special notices limiting their liability to be

1 Story on B. 507, a.

2 Id. 511, 512 a; Nugent *v.* Smith, 1. C. P. D. 437.

3 Story on B. 526.

4 Blower *v.* G. W. Ry. Co. L. R. 7 C. P. 663; Kendell *v.* L. and S. W. Ry. Co. L. R. 7 Exch. 373.

5 Wyld *v.* Pickford, 8 M. & W. 443; Henderson *v.* Stevenson, L. R. 2 H. L. Sc. 470 as explained in Harris *v.* G. W. Ry. Co. 1 Q. B. D. 515; Parker *v.* S. E. Ry. Co. 1 C. P. D. 618; D'Arc *v.* L. & N. W. Ry. Co. L. R. 9 C. P. 325.

6 Act 3 of 1865, s. 6; there seems to be a slip here, as the limiting of the liability as to enumerated articles not exceeding 100 Rs. in value, is omitted.

7 Story on B. 512-525.

Liability limited by express law.

given to, or by, carriers by land, there have been statutes passed in England. There is now Act 3 of 1865 for inland carriers in India, and also the Indian Railway Act (18 of 1854); this latter by Section 9 provides, that the company shall not be answerable for loss or injury to any passengers' luggage, unless it shall have been booked and separately paid for. But this will not prevent the company being liable, if in fact they do not arrange for, but neglect the practice of, booking luggage, and then accept luggage without requiring it to be booked. By Section 10, the company is not liable for gold and silver, notes and other enumerated articles of value, unless the value shall have been declared, and an increased charge for the same accepted. The sender will be concluded by his statement of the value.[1] By Section 11, the company is not allowed, by public notice, or private contract, to limit their ordinary legal liability as to other articles, but will be answerable for loss or injury caused by gross negligence or misconduct on the part of their agents or servants. The provisions of these three sections are not affected by Act 3 of 1865; but that Act applies also to owners of railroads and tramroads; by Sections 3 and 4 articles enumerated in that Act, when of more than 100 Rs. in value, must be declared by the sender and higher rates may be charged; but by Section 7 owners of railroads and tramroads (unlike other inland carriers) are not allowed to limit their liability as to articles not enumerated by any special contract; but, on the other hand, they are liable for loss or damage *only* when it

Indian Railway Act.

1 McCance *v.* London, &c. Ry. Co. 10 Jur. N. S. 1958; as to when receipt by company begins, see Hodgman *v.* W. Midland Ry. Co. 10 Jur. N. S. 673, but *semble* opinion of Cockburn, C. J. (*diss.*) is correct.

shall have been caused by negligence;[1] or by a criminal act on their part or on that of their agents or servants.[2] Where a Railway Company makes a contract to carry beyond their own line, this section will not prevent their limiting by special contract their liability for losses beyond their own line.[3] By Section 12 of the Railway Act on non-payment of the carriage of goods, the company has a lien, coupled with a power of sale, not only upon the goods themselves, but also upon any other goods of the same person coming afterwards into their possession. This peculiar lien supersedes their ordinary rights of lien; and the goods afterwards seized must be the property of the same person, and not merely entered in his name, where he is known to be only an agent.[4] By Sections 13 and 14, they may demand a detailed account of goods brought for conveyance, and there is a penalty for a false account. By Section 15, there is a penalty if any person, without giving due notice, delivers dangerous goods for carriage, and the company has power to stop, or open and examine such suspected goods.

Liability limited by special contract.

322. Where there is no express law as to notices, the rule is, that a common carrier being ordinarily an insurer of the goods he carries, may expressly limit his liability by giving notice that he will not be liable for certain losses, or for certain valuable goods unless paid for at higher rates.[5] But it seems the better opinion that he cannot, by such notices, be allowed to limit his liability for loss by the wrongful conversion of the goods by himself or his servants, or for

1 Not mere gross negligence as in Ry. Act.

2 There are a few more articles enumerated in Act 3 of 1865 than in Ry. Act.

3 Zunz *v.* S. G. Ry. Co. L. R. 4 Q. B. 539.

4 Dresser *v.* Bosanquet, 9 Jur. N. S. 458.

5 Story on B. 549, 554.

loss from gross negligence, that is, from the want of ordinary diligence, or from defects in his vehicles, or from a delivery to a wrong person.[1] Now by Section 6 of Act 3 of 1865, inland carriers in India cannot generally limit their liability by notices; there must be a special contract signed by the owner or his agent, except as to certain articles, as coin, notes, &c., enumerated in the Act, and when these exceed Rs. 100 in value, the sender must declare their value, and the carrier may demand an increased rate of hire. But by Section 8, in every case and as to all articles, every such common carrier will be liable for loss or damage arising from the negligence or criminal act of the carrier or of any of his agents or servants.[2] All actually, though casually, employed in carrying are his servants, though they may be the regular servants of others and paid by them.[3] The English rule now is, that he may thus limit by contract his liability for loss even from gross negligence;[4] but the soundness of the rule to this extent seems doubtful; the law was once otherwise, and is so in America.[5] Such notices will otherwise be construed as to their terms like other contracts. The notice must be brought home to the knowledge of the consignor,[6] and the carrier is bound to the strict performance of his terms; so that he cannot send the goods by a different conveyance, or in a different manner from that agreed upon, or he will be liable for any loss; he may be liable for loss from defective vehicles, unless the notice includes such loss.[7] Where by a special notice a railway com-

1 Story on B. 549, 554, and 570, 571, a.

2 See Martin *v.* G. Indian P. Ry. Co. L. R. 3 Exch. 9.

3 Maclin *v.* London, &c. Ry. Co. 2 Exch. 426.

4 P. & O. S. N. Co. *v.* Shand, 11 Jur. N. S. 771.

5 Story on B. 549, a; 2 Hilliard, 571-5; Addison, 395.

6 Story on B. 558, 560.

7 Id. 561, 562.

pany is not a common carrier as to any animal, it is in the position of an ordinary bailee and not liable for loss occasioned or contributed to by the bailor, as by the use of an ordinary but insecure mode of fastening.[1] The consignor, on the other hand, is bound duly to pack the goods ; and he may not practice a fraud on the vigilance of the carrier, as by sending banknotes in a bag stuffed with hay, so as to give it a mean appearance.[2]

Omission to declare contents.

323. Provided he uses no artifices, the consignor is not bound to declare the contents of a parcel ; but the carrier is entitled to a true answer if he enquires ; he cannot, though, in all cases refuse to carry, if the owner declines to state the contents, though he declares the value, unless he has reason to suspect that the articles are dangerous.[3] If goods are apparently safe to be carried, but are in fact dangerous, and the consignor is aware of such danger, and leaves the carrier in ignorance thereof, he will be liable if damage ensues.[4] Where there is a notice limiting the liability as to valuable goods, or where the goods are among those enumerated in Act 3 of 1865, and exceed Rs. 100 in value, an omission to declare the contents is an implied holding out that the goods are of the ordinary value ; the sender must declare the value, but otherwise the carrier is bound to make the inquiry.[5] If the carrier accepts goods as "contents unknown," he contracts to carry them whatever the contents may be, though in fact by mistake they were misdescribed.[6] Where he is protected

1 Richardson *v.* N. E. Ry. Co. L. R. 7 C. P. 81.

2 Story on B. 563, 565 ; Gibbon *v.* Paynton, 4 Burr. 2298.

3 Story on B. 566-7 ; 2 Hilliard, 570, Crouch *v.* London, &c. Ry. Co. 14 C. B. 255.

4 Brass *v.* Maitland, 6 E. & P. 486 ; Farrant *v.* Barnes, 8 Jur. N. S. 868.

5 Story on B. 568 ; Whaite *v.* L. & Y. Ry. Co. L. R. 9 Exch. 67.

6 Lebeau *v.* G. S. N. Co. L. R. 8 C. P. 88.

by the omission to declare and the goods are by his negligence taken beyond their destination, and then lost or injured, he is still protected by the omission from liability.[1] But it would seem that though the sender does not declare the value as required by Section 3, yet, by Section 8, a carrier would still be liable for loss or damage, if arising from the negligence or criminal act of himself or servants, but not otherwise.[2] By Section 4 the increased rates cannot be charged, unless a tariff of such rates is stuck up in the office; but the sender should declare the value though there is no such tariff.[3]

323, *a*. To write outside the package the nature of the contents is not a sufficient declaration.[4] If a package consists partly of enumerated articles above Rs. 100 in value, and partly of others, the liability for these latter continues, though for the want of a declaration there is no liability for the former.[5] "Loss" in the Act means so that the things cannot be found, not loss from delay in delivery.[6] And "writings" mean writings of value; an imperfect deed is not such.[7]

324. There may be a waiver of the declaration; but the mere receipt of the goods by the carrier, the apparent value of which is beyond the sum for which a declaration is required, is not such; but if the sender declares the value he is not bound to tender the increased rate, and if the ordinary charge only is made, it is a waiver of the right to the higher rate, and the carrier will

Waiver of declaration.

1 Morritt *v.* N. E. Ry. Co. 1 Q. B. D. 302.

2 Metcalfe *v.* London, &c. Ry. Co. 27 L. J. 205, 333, C. P.; Hart *v.* Baxendale, 6 Exch. 769.

3 Ibid.

4 Owen *v.* Burnett, 2 C. & M. 353.

5 Bernstein *v.* Baxendale, 28 L. J. 265 C. P.

6 Hern *v.* London, &c. Ry. Co. 10 Exch. 801.

7 Stoessiger *v.* S. E. Ry. Co. 23 L. J. 29 Q. B.

be liable for loss or damage.[1] Ordinarily, upon a loss, damage, or non-delivery, the burden of proof is on the carrier to show that he exercised exact diligence;[2] and by Section 9, Act 3 of 1865 the plaintiff need not prove that loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents; but nothing is said as to the rule where the loss was owing to some other cause for which the carrier is liable. Where the goods have been stolen, though it is not necessary to show that the taking was by any particular servant of the carrier, still there must be at least a *primâ facie* case that the taking was by some one or other of his servants.[3]

Proof of negligence.

325. The liability begins upon delivery to, and acceptance by the carrier; the delivery may be constructive as well as actual.[4] Where the owner or his agent accompanies the goods, and has exclusive custody of them, the carrier is not liable.[5] The liability ends when the goods have arrived at their place of destination, and are deposited there, and no further duty remains on the carrier;[6] but it seems to be the duty of the carrier to give notice of arrival, and to wait a reasonable time for their removal; after that his liability is only as a warehouseman or ordinary bailee.[7] The carrier will not be liable to the consignor, if by the order of the consignee, the delivery is at a place different from that

When the liability begins.

When it ends.

1 Behrens *v.* G. N. Ry. Co. 8 Jur. N. S. 59, 567; Story on B. 572.

2 Story on B. 574.

3 McQueen *v.* G. W. Ry. Co. L. R. 10 Q. B. 573 dissenting from Vaughton *v.* L. & N. W. Ry. Co. L. R. 9 Exch. 93.

4 Story on B. 532, 534-7; 2 Hilliard, 553.

5 Story on B. 533; East India Co. *v.* Pullen, 1 Stra. 690.

6 Story on B. 538. See Shepherd *v.* B. & E. Ry. Co. L. R. 3 Exch. 189, where the Court differed upon the facts.

7 Mitchell *v.* L. and Y. Ry. Co. L. R. 10 Q. B. 260.

agreed upon with the consignor.[1] Where a carrier receives a parcel addressed to a place beyond his own limits, but makes no agreement to restrict his liability, it continues till the parcel arrives at its place of destination, and he is liable, and is the proper person to be sued, though it be lost beyond his limits;[2] or if there is a condition excluding liability for loss beyond his limits, he must show that the goods passed safely out of his custody.[3] In the former case the carrier beyond is the agent of the first carrier; so conversely where the first carrier is the agent for the carrier beyond, the latter may be sued, though the contract to receive and forward the goods was with the former;[4] and the same principle is in the case of passengers as of goods.[5]

Delivery of goods carried by land.

Where there is one entire contract to carry partly by land and partly by sea, the contract is divisible and as to the land journey the carrier is within the protection of the Carriers' Act.[6] Whether the carrier is bound to make a personal delivery to the consignee, will depend much upon the usage of particular places and trades; generally, it seems that, if there is no usage or contract to the contrary, an actual delivery is necessary;[7] but as to railways the rule seems to be that their duty is to deliver on the platform, if the consignee is present, or if not present, then to keep the goods safely for a reasonable time.[8]

1 Bartlet *v.* L. & N. W. Ry. Co. 8 Jur. N. S. 58.

2 Story on B. 538; Muschamp *v.* Lancaster Ry. Co. 8 M. & W. 421; Crouch *v.* London, &c. Ry. Co. 14 C. B. 255. In America the rule seems to be the other way; see 2 Hilliard, 383, and Sedg. on D. (5th ed.) 396 (*n.*)

3 Kent *v.* Midl. Ry. Co. L. R. 10 Q. B. 4.

4 Gill *v.* M. S. and L. Ry. Co. L. R. 8 Q. B. 186.

5 G. Western Ry. Co. *v.* Blake, 8 Jur. N. S. 1013; but see Zunz *v.* S. E. Ry. Co., ante § 321.

6 Le Conteur *v.* L. & S. W. Ry. Co. L. R. 1 Q. B. 54.

7 Hyde *v.* Trent, &c. Co. 5 T. R. 389.

8 Story on B. 543; 2 Hilliard, 382, 557.

Where there is no usage to deliver goods at the house of the consignee, the carrier is yet bound to keep the goods for a reasonable time at his own risk as carrier, and to give due notice to the consignee.[1] It has been thought that, as to railways, there is no duty to give notice, and that the liability after arrival at the terminus, is that of a warehouseman only; but in the absence of law, usage, or contract otherwise, railways are liable as ordinary common carriers.[2] Where the owner interferes to control the place and manner of delivery, this will terminate the exclusive possession, and consequent liability of the carrier.[3]

Delivery of goods carried by sea.

326. It is sufficient if goods brought by a ship, are delivered on board, or at the usual wharf; but there must be due notice to the consignee, who is entitled to receive them on board, and it cannot be insisted that they should be landed at the wharf.[4] If the consignee is dead, cannot be found, or refuses to receive the goods, the duty of the carrier is to secure the goods for the owner, and generally to do what is reasonable under the circumstances of the case. There is no general rule of law requiring him to give notice to the consignor, but in some cases it may be reasonable, and therefore necessary that he should do so.[5] A carrier, after a refusal of the goods at the consignee's address, is an involuntary bailee, and is only bound to act with reasonable care and caution with respect to the goods.[6] He may then

Duty in absence, &c., of consignee.

Time of delivery.

1 Story on B. 545; Bourne *v.* Gatiffe, 11 Cl. and F. 45.
2 Story on B. 543 (n).
3 Id. 541-2.
4 Id. 544.
5 Id. 545; Hudson *v.* Baxendale, 27 L. J. 93 Exch.; G. Western Ry. Co. *v.* Crouch, 27 L. J. 345 Exch.
6 Hengh *v.* L. and N. W. Ry. Co. L. R. 5 Exch. 51; on the subject of mis-delivery, see *ante* § 253.

recover expenses reasonably incurred in the custody of the goods, and would seem also to have a lien for the same.[1] Where there is no special contract as to the time of delivery, it must be within a reasonable time; but if the carrier has used ordinary diligence to prevent delay, he is not liable for delay from accidents,[2] or causes beyond his control.[3] A contract by a railway company to carry by a particular train which ordinarily arrives at a particular hour, is not a warranty that it will so arrive.[4] A delivery to a wrong person, even innocently, is a conversion;[5] but a delivery to the consignee named, though at a place short of that named is a good delivery as against the consignor.[6] Where the carrier is agent for the sale of the goods on arrival, then, as soon as the goods are landed or stored for sale, he is only liable as factor; and where, by the course of trade, a single payment as freight is made to the owners of the ship, the master is their agent as factors, but it is otherwise if there is a distinct agreement with the master alone.[7] So, where luggage, &c., is lodged in the cloak room at a railway station, it is not received by the company as carriers, but it is a deposit with or without hire as the case may be.[8]

When non-delivery is excused.

327. The carrier is excused where there has been loss by the act of God,[9] by public enemies, or by reason of inherent defects, or where from the nature of the goods they are liable to peculiar risks, and

1 G. N. Ry. Co. *v.* Swaffield, L. R. 9 Exch. 132.

2 Story on B. 545, a.

3 Taylor *v.* G. N. Ry. Co. L. R. 1 C. P. 385.

4 Lord *v.* M. Ry. Co. L. R. 2 C. P. 339.

5 Story on B. 545, b.; Ross *v.* Johnson, 5 Bur. 2825.

6 Cork D. Co. *v.* G. S. and W. Ry. Co. L. R. 7 H. L. 269.

7 Story on B. 546-8.

8 Van Toll *v.* S. E. Ry. Co. 8 Jur. N. S. 1213; Harris *v.* G. W. Ry. Co. 1 Q. B. D. 515.

9 Nugent *v.* Smith, 1 C. P. D. 437; see *ante* § 320.

he has taken all proper precautions against them; or where there has been a seizure consequent upon some illegal act of the shipper, or where the right of stoppage in transit is duly exercised.[1] Where an adverse title is set up, and notice is given to the carrier not to deliver, he will deliver to either party at his peril.[2] When goods are consigned to a vendee and lost, the consignee is the person to sue the carrier, for the consignor was his agent to retain him: it is otherwise where the goods were sent for approval; or where the carrier contracted with the consignor in consideration of his becoming responsible for the hire; so where the property has not passed to the vendee, or the carrier is not of the vendee's selection expressly or impliedly, or generally where he is employed by the consignor, and the goods are at his risk, then the consignor is the proper plaintiff.[3]

Who should sue the carrier.

328. On delivery of goods to a carrier, he acquires a special interest in them enabling him to sue.[4] Though the carriage is dispensed with, the hire may be demanded, as there have been risks incurred by the delivery to him;[5] so the hire may be demanded in advance, and he has a lien for the hire; but this is a particular lien only, and cannot, even by notice, but only by a special contract, be made a general lien;[6] but a lien does not authorise a sale, but it will exist though there has been a wrongful delivery by one not the owner, if the carrier carries the goods innocently.[7] Generally, the consignor is bound

General rights of a carrier.

1 Story on B. 574—6; 579—81.

2 Id. 582; Sheridan *v.* New Quay Co. 28 L. J. 58 C. P.

3 Coats *v.* Chaplin, 3 Q. B. 483; Coombs *v.* Bristol, &c. Ry. Co. 27 L. J. 269, 401, Exch; 1 Selw. N. P. 456.

4 Story on B. 585.

5 Ibid.

6 Wright *v.* Snell, 5 B. and Ald. 350; 1 Selw. N. P. 455.

7 Story on B. 586, 588.

to pay the hire or freight, but the consignee may expressly or impliedly engage to do so, and then he also is responsible for the same.[1]

Common ferryman is a common carrier.

329. A common ferryman is a common carrier, and is bound to provide safe and secure ferry boats, and safe slips and landing stages, and all proper means and appliances for the safe transit of persons who may have occasion to use the ferry for themselves, or for the transit of their horses and carriages, luggage and merchandize.[2] In England it seems that an ancient or common ferry is a monopoly derived from royal grant, and that the ferryman is bound always to keep such a ferry up and is liable by indictment if he neglect to do so.[3] If the ferryman overloads the boat, and, for the safety of the lives of the passengers, it becomes necessary to throw some of the goods over, the ferryman will be liable to the owners thereof, but not if the necessity arose from a storm, no default being in the ferryman.[4] A right of ferry, where it exists, is limited by the particular user, as from spot A to B. A new line that is not substantially the same as the old line is not an invasion of the right; but there is no precise rule as to what proximity is an invasion.[5]

QUASI-BAILEES OF CUSTODY.

330. There are some persons who resemble bailees, but their custody of goods is not consequent upon any contract; thus, revenue officers and others who seize property for supposed

1 Story on B. 589.

2 Willoughby *v.* Horridge, 12 C. B. 751.

3 Letton *v.* Goodden, L. R. 2 Eq. 131.

4 Mouse's Case, 12 Co. 63.

5 Newton *v.* Cubitt, 9 Jur. N. S. 544.

Revenue and judicial officers.

forfeitures; if the seizure was without justifiable cause, they are responsible for all losses and damages; if the seizure was for a justifiable cause, they are responsible only for losses and damages occasioned by the want of ordinary diligence.[1] So, the officers of a Court, entrusted with the custody of property, are bound to exercise ordinary diligence; and the same rule applies to receivers, and other depositaries appointed by the Court.[2] The finder of lost property on land is subject to the same responsibility as an ordinary bailee; he may not sue for salvage or compensation, but he may detain the goods till paid for his trouble, and as to goods commonly on sale, he may sell them if perishable, or if his charges amount to two-thirds of the value and the owner declines to pay them.[3] Salvors, or those who assist and save ships in distress or abandoned at sea, are entitled to salvage, and have a lien for the same; they are bound to exercise ordinary diligence, and are *bonâ fide* possessors whose possession cannot be lawfully displaced by any third persons.[4]

Finder of property.

Salvors.

331. Another class of torts by breach of a private duty existing by reason of a contract between the parties, is where damage ensues from deceit. If a falsehood be knowingly told, with an intention that another person should believe it to be true, and act upon it, and that person has acted upon it, and thereby suffered damage, the party telling the falsehood is responsible in damages in an action for deceit, there being a conjunction of wrong

ACTIONS FOR DECEIT.

1 Story on B. 618.

2 Id. 620—1.

3 Ss. 71, 151, 168, 169 I. C. Act; Story on B. 621, a; ante § 283.

4 Story on B. 622—3.

and loss, entitling the injured party to compensation.[1] It is no excuse that the person at the time really forgot the truth, if the fact was one which ought to have been within his knowledge.[2] The weight of authority in England certainly is, that there must be moral as well as legal fraud; but the rule, so far as the distinction is a substantial one, does not seem very satisfactory.[3] It is not necessary, in all cases, to show that the defendant knew the representation to be untrue: for if he made the statement for a fraudulent purpose, and without believing it to be true, and with the intention of inducing the plaintiff to do an act, and that act is done to the prejudice of the plaintiff, the defendant is liable.[4] The representation need not be made directly to the plaintiff; it is sufficient if it be made for communication to him or to the class of persons to which he belongs, or to the public generally with a view of its being acted on.[5] It is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff; whether the defendant has any interest in the assertion he makes, or in the matter respecting which it is made, is perfectly immaterial, the general rule being, that if any man makes a fraudulent representation for another to act upon it, either directly or indirectly, and it is calculated to induce that other person to act on it, and he does act on it, the person who makes the represent-

False representation, what.

1 The leading case is Pasley *v.* Freeman, 2 Sm. L. C. 62. See also Polhill *v.* Walter, 3 B. & Ad. 114.

2 Slim *v.* Croucher, 6 Jur. N. S. 437.

3 See the question discussed in 2 Sm. L. C. 81, and in Norton's Topics of Jur. 230-3; and see Spackman's Case, 10 Jur. N. S. 911 on the word "fraud."

4 Taylor *v.* Ashton, 11 M. & W. 415.

5 Swift *v.* Winterbotham, L. R. 8 Q. B. 253 and 9 Q. B. 301; Richardson *v.* Silvester, L. R. 9 Q. B. 34.

ation is responsible in damages.[1] But the damage must be brought about by the wrongful act of the defendant; it will not be so, if in fact the plaintiff did not rely upon the representation; but it will be no defence that the plaintiff was partially influenced by other inducements to act upon it.[2] In respect to contracts, fraud and misrepresentation are defined and distinguished in Sections 17 and 18 I. C. Act. The former involves the intent to deceive, while the latter seems to be an unjustifiable but innocent misleading. Fraud affects agents and principals alike, and active fraud makes all contracts voidable; but not so passive or silent fraud, or misrepresentation, if the truth was discoverable by ordinary diligence.

As to a right.

332. An action is maintainable for a false and malicious representation, though made under the pretence of a claim of right, if it was made without reasonable and probable cause, and must have been known to be false by the party making it, and special damage has resulted to the plaintiff from the wrongful act; as where one has falsely pretended that he was entitled to a lien on goods.[3] But if A, makes a false representation to B, to induce him to bring an action against C, and B sues and recovers, no action will lie by C against A.[4] For, in general, it is not actionable to induce a third person to bring a wrongful action, except, perhaps, under the circumstances stated in Section 68; so, a man shall not have an action against another, because that other has previously brought an action against him, the mere exercise of the right to sue not being,

1 Polhill *v.* Walter, &c., supra.

2 Clarke *v.* Dickson, 28 L. J. 225 C. P.

3 Green *v.* Button, 2 C. M. and R. 716.

4 Collins *v.* Cave, 28 L. J. 204 Exch.

in itself, a ground on which any one is enabled to say that he is damnified;[1] and so also, no action will lie against a person for giving false evidence at a trial.[2]

What is not known to be true, is false.

If a man undertakes positively to assert that to be true which he does not know to be true, and which he has no grounds for believing to be true, he does in reality make a wilful representation which he knows to be false.[3] It is no defence that the representation is capable of a meaning not literally false, if that is not the proper sense in which the words ought to be taken as used.[4]

Directors of Companies.

333. If directors of public companies authorize the publication and circulation of prospectuses and advertisements concerning the affairs of the company, containing statements, with their signatures annexed thereto, which are false to the knowledge of the directors, or which the directors, from their position and means of knowledge, may fairly be taken to warrant as true, they will be responsible in damages to parties who have taken shares, and invested money in the company, on the faith of these prospectuses, and have sustained damage in consequence thereof.[5] But the estate of a deceased director not shown to have benefited by the deceit, cannot be made liable for the losses from it.[6] Where the company has adopted these representations there may be an action against the company also, but not against an individual shareholder who has not signed the report.[7] But the pro-

1 Cotteril *v.* Jones, 11 C. B. 713.
2 Collins *v.* Cave, 5 Jur. N. S. 296.
3 Evans *v.* Edmonds, 13 C. B. 786.
4 Clarke *v.* Dickson, 28 L. J. 225 C. P.
5 Henderson *v.* Lacon, L. R. 5 Eq. 249; Reese River, &c. Co. *v.* Smith, L. R. 4 H. L. 64; Jackson *v.* Turquand, ibid. 305; Peek *v.* Gurney, L. R. 6 H. L. 377.
6 Peek *v.* Gurney, L. R. 6 H. L. 393.
7 See New Brunswick, &c. Co. *v.* Conybeare, 8 Jur. N. S. 845; David-

spectus of an intended company affects only the original allottees, and not subsequent purchasers of shares not influenced by it.[1] The manager or secretary of a jointstock bank is not civilly irresponsible for false or fraudulent statements, touching the state of the bank, which induced plaintiff to buy shares, although he may have acted under the authority of the directors.[2] A false representation, to be the representation of the company, must be made by a report adopted at a general meeting, and put forth to the public, either intentionally, or becoming circulated in the ordinary course of business. A company will not be allowed to retain any direct advantage from fraudulent representations of their directors, as an increased price for their shares;[3] but they would not be liable for any incidental loss to the plaintiff, unless they knew that the representations were made with intent to defraud the plaintiff.[4] A person has a right not only not to be misled by any statements actually false, but to be informed of all the facts, the knowledge of which might reasonably have deterred him from contracting for shares; a prospectus may thus contain misrepresentations, or the absence of true representation.[5] Still mere trifling errors, or overpraise of the prospects of a company, will not amount to a deceptive statement.[6] A misrepresentation as to a mere matter of law is not a ground

son *v.* Tulloch, 6 Jur. N. S. 543; Clarke *v.* Dickson, 28 L. J. 225 C. P.; Barry *v.* Croskey, 2 John & H. 27; Addie *v.* W. B. Scotland, L. R. 1 H. L. Sc. 145.

1 Peek *v.* Gurney, L. R. 6 H. L. 411.

2 Cullen *v.* Thomson, 9 Jur. N. S. 85.

3 Addie *v.* W. B. Scotland, L. R. 1 H. L. Sc. 158, 167.

4 New Brunswick, &c. Co. *v.* Conybeare, 8 Jur. N. S. 575; *Ex. p.* Frowd, 3 L. T., N. S. 843.

5 New Brunswick Co. *v.* Muggeridge, 7 Jur. N. S. 132; Peek *v.* Gurney, L. R. 6 H. L. 377.

6 Kisch *v.* Venezuela Ry. Co. 11 Jur. N. S. 646; L. R. 2 H. L. 99.

for relief.[1] Though it is enough to show that there was a fraudulent representation as to any part of that which induced the party to enter into the contract which he seeks to rescind, yet an innocent misrepresentation or misapprehension not constituting a complete difference in substance, and so a failure of consideration is not a ground for rescission.[2] So a party otherwise entitled may, after a knowledge of the misrepresentation, be barred by acquiescence and acts inconsistent with his right to repudiate.[3] A false representation by an officer of a company, (not being within the scope of his authority), even though made at the office, is not the representation of the company.[4] The member of a company though induced by fraud to take shares in it, and so having a good defence as between himself and the company, may still be liable to the creditors of the company, and to contribute to the assets for their payment.[5] A single shareholder may have an action against the directors, or any one of them, in respect of any transaction which the body of shareholders could not sanction, as the fraudulently declaring dividends out of capital; but otherwise, the company, and not the directors, may be liable.[6] The personal liability of directors is governed by the ordinary law of principal and agent; and a shareholder may sue them personally where he charges them with breach of their trust towards the company.[7] Directors having a discretion as to accepting a transfer of shares must exercise it reasonably.[8]

1 Rashdale *v.* Ford, L. R. 2 Eq. 750.

2 Kennedy *v.* P. &c. Co. L. R. 2 Q. B. 587.

3 *Ex-parte* Briggs, L. R. 1 Eq. 483; Sharpley *v.* L. Ry. Co. 2 Ap. C. 663.

4 *Ex. p.* Frowd, supra.

5 Oakes *v.* Turquand, L. R. 2 H. L. 325.

6 Davidson *v.* Tulloch, supra.

7 Ferguson *v.* Wilson, L. R. 2 Ch. 77; and See Turquand *v.* Marshall id. 4 Ch. 376.

8 Robinson *v.* Chartered Bk. L. R. 1 Eq. 32.

Representations amounting to a warranty.

334. Whenever a representation amounts to a warranty of the fact stated, and is untrue, it is fraudulent, whether there was knowledge, or want of knowledge, of the untruth on the part of the person making it.[1] A warranty will not bind a man in a thing that is apparent; as to warrant that a horse has both his eyes, when he is manifestly blind of one of them.[2] But a purchaser, who relies upon a warranty, is not bound to make any particular examination of a horse before he buys; and though, if, not relying on the warranty, he had done so, he might have ascertained the defect, he may have an action for deceit.[3] One who sells goods with a counterfeit trade-mark will be liable to the purchaser for damages.[4] If what passes between a vendor and purchaser forms no part of the negotiation ending in the purchase, it cannot be treated as a warranty; a previous private representation regarding a horse afterwards sold by public auction, is not a warranty.[5] The representation by a party of a particular fact, where the means of knowledge lie peculiarly or exclusively within his reach, will be a warranty; as where a diamond merchant represents a particular stone to be a diamond, and sells it as such.[6] But a representation concerning a matter which is obvious to ordinary intelligence, and lies as much within the knowledge of one party as the other, will not induce liability unless made for the purpose, and with the effect, of throwing the other party off his guard.[7] So, a mere expression of opinion and belief as to such a matter, will

1 Williamson *v.* Alison, 2 East, 450.

2 Ekins *v.* Tresham, 1 Lev. 102.

3 Holyday *v.* Morgan, 28 L. J. 9 Q. B.; Smith *v.* Bryant, 10 Jur. N. S. 1107.

4 Crawshay *v.* Thompson, 4 M. & Gr. 386 (n.)

5 Hopkins *v.* Tanqueray, 15 C. B. 130.

6 Chandelor *v.* Lopus, 1 Sm. L. C. 140.

7 Clapham *v.* Shillito, 7 Beav. 149.

not make a man liable.[1] An advertisement of a sale is not a contract or warranty that any or all of the articles advertised shall be put up to sale; but an advertisement to let where there is no intention or power to let will give a cause of action to any one who incurs expense in consequence.[2]

Articles required for particular purpose.

335. It is not necessary that the seller should say "I warrant;" it is sufficient if he says that the article he sells, is of a particular quality, or fit for a particular specified purpose.[3] A person who receives an order, and gets an article made for a particular purpose, is as much the manufacturer of it as the person who actually makes it.[4] In buying an article for a particular purpose, if the buyer relies on his own judgment, and not on that of the seller, he cannot have an action for deceit.[5] But to an absent purchaser, every representation as to the fairness or quality of the article sold, is a warranty.[6]

Sale of goods by sample.

In the sale of goods by sample, the seller impliedly represents or warrants that the bulk is equal in quality to the sample,[7] and he does no more than this. The purchaser takes the risk of all latent defects, and infirmities inherent in the article, and unknown to the seller, whether they arise from natural causes, or fraudulent dealings with the goods by parties through whose hands they have passed.[8]

1 Ormrod *v.* Huth, 14 M. & W. 652.

2 Harris *v.* Nickerson, L. R. 8 Q. B. 286; Richardson *v.* Silvester, L. R. 9 Q. B. 34.

3 Jones *v.* Bright, 5 Bing. 533; ss. 113, 114 I. C. Act.

4 Brown *v.* Edgington, 2 M. and Gr. 289.

5 Ibid.

6 Gardiner *v.* Gray, 4 Camp. 144.

7 S. 112 I. C. Act.

8 Parkinson *v.* Lee, 2 East, 320; s. 116 I. C. Act.

336. In England it has been decided, but it is doubtful law, that an action for deceit will not lie against the principal, where a contract was induced by a representation, which, though false within the knowledge of the principal, was not so within that of the agent.[1] The Court of Exchequer was equally divided upon the other question, whether a principal, who has had the benefit of a contract induced by the fraud of his agent, is liable, being himself innocent, in an action for deceit, to make good to the third party the loss he has sustained by the agent's fraud.[2] In the latter case, the agent would of course, be liable; but in both, it would seem, the principal should also be liable, the representation being one that would have been within the agent's authority to make if it had been true;[3] and it is plain that the principal could not sue upon a contract in itself valid, but preceded and brought about by fraudulent representations of the agent.[4] The Privy Council has held that fraud and any other wrong by a servant or agent, are on the same footing, and the principal is liable for the fraud of his agent done in the course of his business and for his benefit; and this seems to be the principle adopted by the Indian Contract Act.[5] The master of a ship has only authority to sign bills of lading for goods when shipped, and, therefore, the owner is not liable for the fraud of the master in signing bills for goods not shipped.[6]

Representations by agent.

1 Cornfoot *v.* Fowke, 6 M. and W. 358. See Story on Agency, 139, and 2 Sm. L. C. 81-3.

2 Udell *v.* Atherton, 7 Jur. N. S. 777.

3 2 Hilliard, 461-2; Barwick *v.* English J. S. Bk. L. R. 2 Exch. 265; Swift *v.* Winterbotham, L. R. 8 Q. B. 244, and 9 Q. B. 301.

4 Udell *v.* Atherton, 7 Jur. N. S. 779.

5 Mackay *v.* Commercial Bank, L. R. 5 P. C. 394, 411; ss. 238, 17 I. C. Act.

6 Grant *v.* Norway, 10 C. B. 605; but see s. 238 ill. (*b*) I. C. Act.

A servant combining with his master to tell an untruth to the prejudice of a third person, is also liable with his master to such person.[1] If an agent who has no authority, and knows it, makes a contract as having such authority, he is responsible in an action for deceit.[2] And even if he makes a contract as agent, *bonâ fide* believing that he has authority, but has in fact no authority, he is still personally liable. The wrong to the person who is damaged in consequence, differs then only in degree, but not in essence.[3] So, if one employs another to do an act which the employer assumes to have, and appears to have, a right to authorize him to do, and he has no such right or authority, he is guilty of deceit, and must indemnify his agents for all wrongful acts done by them in the course of such employment.[4] But an infant cannot be sued for a false and fraudulent representation that he was of full age, and so inducing another to contract with him; and, generally, infancy is a good defence to an action for deceit.[5] So, an action will not lie against a husband and wife, who are subject to English law, or either of them, for a false representation by the wife that she was unmarried, whereby the plaintiff was induced to make a contract with her, which he could not enforce by reason of her being married.[6]

False representation as to authority.

337. A concealment of the truth will alone, in certain

1 *per* Lord Wensleydale, in Cullen *v.* Thomson, 9 Jur. N. S. 85; Swift *v.* Winterbotham, supra.

2 Story on Agency, 264; s. 235 I. C. Act.

3 Collen *v.* Wright, 8 E. and B. 647.

4 Adamson *v.* Jarvis, 4 Bing. 66; Story on Agency 339; s. 223 I. C. Act.

5 Bartlett *v.* Wells, 8 Jur N. S. 762. See Lindley on Juris. p. xciv.

6 Liverpool, &c. Co. *v.* Fairhurst, 9 Exch. 422; Wright *v.* Leonard, 8 Jur. N. S. 415.

Concealment of truth when tortious.

cases, and under certain circumstances, amount to a fraud, and give rise to an action for deceit.[1] There may be a custom in a trade for the seller to disclose particular defects at the time of sale, if he knows of them; and then he will be liable, if he omits to do so.[2] And generally, if a seller knows of material latent defects affecting the value of the goods, but offers them at the ordinary price, knowing that the buyer is grossly deluded by their appearance, he will be liable in damages for wilful deceit.[3] But patent defects, discoverable by ordinary inquiry need not be disclosed; but then no art or contrivance must be resorted to in order to conceal such defects.[4] Where there is no legal obligation to divulge, mere silence on the part of the vendor though he knew that the purchaser was mistaken as to the quality of the object, does not avoid the contract.[5] Similarly a purchaser is not bound to disclose any fact exclusively within his knowledge, which would influence the price of the subject sold; the inducing in any manner a vendor to believe the existence of a non-existing fact influencing the price, will render the sale voidable, but simple reticence does not amount to legal fraud.[6] A sale of a chattel "with all faults," will not justify a sale with all frauds;[7] and a stipulation that the thing is to be taken without allowance for any defect, error, or misdescription, protects the seller only from all uninten-

Latent and patent defects.

Sales with all faults.

1 Pickering v. Dowson, 4 Taunt. 779; s. 17 (2) explan. I. C. Act.

2 Jones v. Bowden, 4 Taunt. 847; s. 110 I. C. Act.

3 Hill v. Gray, 1 Stark, 434.

4 Hill v. Balls, 27 L. J. 45 Exch.; Horsfall v. Thomas, 8 Jur. N. S. 721; s. 19 excep. I. C. Act.

5 Smith v. Hughes, L. R. 6 Q. B. 604.

6 Sugden's V. and P. (13th ed.) 4; s. 17 (2) and s. 19 ill. (*d*) I. C. Act.

7 Baglehole v. Walters, 3 Camp. 154.

tional mistakes and errors, and not from the consequences of any wilful deception.[1]

338. By reason of his employment, every ministerial officer of a Court has a duty towards any party to a suit who is entitled to the execution of process on his behalf, and such officer is, therefore, liable to an action, if he fraudulently or negligently omits to perform his duty; thus, he is liable, if, from fraud or negligence, he omits to arrest on mesne or final process, or having arrested suffers the defendant to escape, or if he takes insufficient security, or falsely returns that there was no property on which execution could be had, or omits to account for the proceeds of an execution. Generally, an action will not lie unless the plaintiff proves some actual damage;[2] but as to arrest or escape on final process, no actual loss need be shown, since the plaintiff is entitled to have the person of his debtor in custody and will recover at least nominal damages.[3] As to arrest on mesne process (as under Section 75 Code of Civil Procedure,) the plaintiff must prove the existence of the debt, and the damage from non-arrest or escape.[4] If the person to be arrested, does not abscond, but continues in the daily exercise of his usual occupation, and appears publicly, and the officer, neglecting to arrest him, returns that he was not found, it is proof of a false return.[5] That the debtor was seen abroad after the return of the writ, and that bail has not been put in, will be evidence of an escape.[6] The officer

FRAUD OR NEGLIGENCE BY THE OFFICER OF A COURT.

Non-arrest or escape.

1 Taylor v. Buller, 5 Exch. 779.

2 Brown v. Jarvis, 1 M. & W. 704; Williams v. Mostyn, 4 M. & W. 145.

3 Clifton v. Hooper, 6 Q. B. 468.

4 Alexander v. Macauley, 4 T. R. 611; Scott v. Henley, 1 M. and Rob. 227.

5 Beckford v. Montague, 2 Esp. 475.

6 Fairlie v. Birch, 3 Camp. 397.

is bound by his return both as to the fact and the time of the arrest;[1] and a party arrested in one action, is in custody under all writs afterwards delivered to the officer, unless the first arrest was illegal.[2] A voluntary escape is by the express consent of the keeper; a negligent one is without consent or knowledge; release by mistake is a voluntary escape.[3]

Taking insufficient security.

339. An officer is bound to exercise a reasonable discretion and caution in accepting sureties,[4] and slight evidence by the plaintiff of their insufficiency will shift the burden of proof upon the officer.[5] If he actually knows that the party is not responsible, or, having the means of informing himself, he neglects to use them, then, notwithstanding apparent responsibility, he is liable if the party be really insufficient.[6] Reputation among neighbours is evidence of the surety's credit. If one of two sureties is insufficient, the plaintiff must recover.[7]

Negligent execution or false return.

An officer may be liable for negligently omitting to levy execution upon the debtor's goods,[8] or for want of care in not selling them to the best advantage,[9] or for falsely returning that there were no goods,[10] or that they remained in his hands for want of buyers,[11] or that they were subject to prior writs or prior assignments, the officer having notice that such prior writs or assignments were fraudulent.[12] The plaintiff must

1 Cooke *v.* Round, 1 M. & Rob. 512.
2 Collins *v.* Yewens, 10 A. & E. 570.
3 Filehood *v.* Clements, 6 Dowl. P. C. 508.
4 Jeffery *v.* Bastard, 4 A. and E. 283.
5 Saunders *v.* Darling, B. N. P. 60.
6 Scott *v.* Waithman, 3 Stark. 170.
7 Ibid.
8 Mason *v.* Paynter, 1 Q. B. 981.
9 Gawler *v.* Chaplin, 2 Exch. 506.
10 Wylie *v.* Birch, 4 Q. B. 566.
11 Rowe *v.* Ames, 6 M. & W. 747.
12 Deway *v.* Baynton, 6 East, 257.

prove some actual loss.[1] In an action for a false return of no goods to a writ against the goods of A and B, the plaintiff must have a verdict if he prove that either had goods.[2] That the process was absolutely void, but not merely erroneous, is a defence for neglecting to execute it, or for an escape.[3] So, the judgment, on which the writ was issued, may be shown to have been fraudulent and void, but not merely erroneous;[4] a clear case of fraud must be made out,[5] and the judgment cannot be impeached on the ground of a collateral fraud.[6]

Defences.

340. By reason of the contract of employment between the parties, a solicitor, and, in India, a vakeel, is bound to exercise ordinary diligence, and to employ a fair average amount of professional skill and knowledge; and he is liable to his client for damage from a breach of duty in not using such diligence and skill;[7] as, if he negligently or ignorantly conducts his client's suit,[8] or suffers him to enter into covenants and stipulations more onerous than usual without explaining to him the peculiar liability that will be incurred.[9] But if the solicitor, or vakeel, can prove affirmatively that even his diligence would have been ineffectual, it is a bar to the action, unless loss has occurred independent of the necessary result of the suit or other proceeding.[10] So, it is a

BREACH OF DUTY by a solicitor or vakeel.

1 Wylie *v.* Birch, supra; Hobson *v.* Thelluson, L. R. 2 Q. B. 642; Stimson *v.* Farnham, L. R. 7 Q. B. 178.

2 Jones *v.* Clayton, 4 M. & S. 349.

3 Weaver *v.* Clifford, Cro. Jac. 3.

4 Lane *v.* Chapman, 11 A. & E. 966.

5 Tyler *v.* Leeds, 2 Stark. 221.

6 Imray *v.* Magnay, 11 M. & W. 277.

7 Godfroy *v.* Dalton, 6 Bing. 468; the name "solicitor" is now properly used in England instead of "attorney."

8 Bracey *v.* Carter, 12 A. & E. 373.

9 Stannard *v.* Ullithorne, 10 Bing. 491.

10 Godfroy *v.* Jay, 7 Bing. 413; Lee *v.* Ayrton, Peake, 119.

fraud and breach of faith to the client, if a solicitor or vakeel, in any way, uses to the client's prejudice, the knowledge of the client's affairs, which he acquired during the fiduciary relation between them; and not only may he be made liable in an action for damages, but he may also be prevented, by injunction, from so using such knowledge.[1] A solicitor retained to conduct a case has authority to compromise unless expressly forbidden to do so;[2] and so also has a counsel; and the compromise being within his apparent general authority, it binds his client though he dissented unless such dissent was known to the other side.[3] Generally the force of a solicitor's retainer ceases when judgment is recovered, but if there is evidence that the relation was continued, the solicitor has still authority after judgment to compromise.[4] There is, and can be no contract between a barrister and his client. If the barrister acts in good faith, he is not liable to his client; he may be liable if he acts towards him with fraud, malice, or treachery;[5] but the relation of counsel and client renders the parties mutually incapable of making an alleged contract of hiring or service concerning advocacy, whether before or during or after the litigation.[6] A solicitor cannot pledge his client's credit to his counsel for the latter's fees.[7] On the same ground as a solicitor, other professional agents, such as a valuer or a patent agent, are liable to their clients for want of reasonable skill and care in conducting

—by a barrister.

1 Davies *v.* Clough, 8 Sim. 262; Collett on Injuns. 158.

2 Chowne *v.* Parrott, 9 Jur. N. S. 1290; Pristwick *v.* Poley, 11 Jur. N.S. 583.

3 Strauss *v.* Francis, L. R. 1 Q. B. 379.

4 Butler *v.* Knight, L. R. 2 Exch. 109.

5 Swinfen *v.* Chelmsford, 5 H. & N. 919; 6 Jur. N. S. 1035.

6 Kennedy *v.* Broun, 9 Jur. N. S. 119.

7 Mostyn *v.* Mostyn, L. R. 5 Ch. 457.

business on their behalf; but, as has been seen, an arbitrator is not so liable.[1]

BREACH OF DUTY consequent upon a fiduciary relation.

341. On the same principle, any clerk will be liable for, and may, by injunction, be restrained from, surreptitiously availing himself of, from communicating to others, information acquired by him in the course of his employment; and a third person, having so acquired information, may be, in like manner, restrained.[2] It seems doubtful whether there is a cause of action against a banker for disclosing, except on a reasonable and proper occasion, the state of a customer's account without proof of special damage.[3] The same remedies of an injunction to prevent loss, and of damages where actual loss has occurred, will be available where a party attempts to use, or has used, a knowledge of any secret of trade, or secret invention, (though not patented), which knowledge he acquired under such circumstances that it would be, or is a breach of faith, on the part of the defendant, either to reveal it, or to make use of it.[4]

—in case of trade secrets.

1 Turner *v.* Goulden, L. R. 9 C. P. 57; Lee *v.* Walker, L. R. 7 C. P. 121; ante § 134.

2 Evitt *v.* Price, 1 Sim. 483; Tipping *v.* Clarke, 2 Hare, 393.

3 Hardy *v.* Veasey, L. R. 3 Exch. 107.

4 Yovatt *v.* Winyard, 1 J. & W. 394; Collett on Injuns. 156.

CHAPTER IV.

THE MEASURE OF DAMAGES.

342. Damages are the pecuniary satisfaction which a plaintiff may obtain by success in an action.[1] It is necessary to distinguish between the right to recover, and the amount to be recovered. By the measure of damages is meant the scale, by reference to which the amount of damages to be recovered, is, in any given case, to be assessed.[2] It is proposed here to confine the inquiry to the rules which fix the measure of damages, but the rules applicable as well in actions on contracts, as for torts, will be stated; some of the rules are common to both classes of actions. A book on the law of contracts must be consulted to ascertain when there is a right to recover at all in cases of contract; and it is hoped that the foregoing pages may generally afford the like information in cases of tort.

KINDS OF DAMAGES.

Nominal.

343. Damages may be said to be of three kinds, namely, *nominal*, *substantial* and *exemplary*. Nominal damages mean a sum of money that may be spoken of, but has, in effect, no existence in point of quantity, as one anna damages. Where there has been a bare breach of contract unattended by any loss, this is the measure.[3] So in torts, as in a bare trespass, or invasion of a right of easement, this may be the measure; but it does not follow that, in torts, the mere absence of any appreciable money loss will reduce the damages to this mea-

1 Mayne on Damages, 1; Co. Litt. 257, a.

2 Broom's Com. 630.

3 Ibid. 631.

sure, for there may be circumstances of malice or insult. In some countries nominal damages will not carry costs, and so the rule as to them becomes important, but in India the costs are always within the discretion of the Court.[1]

Substantial.

344. Substantial damages are those which are intended as a compensation for the injury sustained, whether it be a breach of contract or a tort. As to the former the rule is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed.[2] Hence, in cases of contract, the measure of damages is generally matter of account, and the damages given may be demonstrated to be right or wrong.[3] Hence, in an action for breach of contract, the motive or intention of the defendant will be immaterial.[4] In torts the motive can be inquired into, and may be material; but where it is not so, as in many cases of torts to property, the measure of substantial damages is as accurately ascertainable as in actions on contracts.[5] In point of fact, such damages are often only in theory a compensation; interest and costs are the only damages for non-payment of a debt, but a creditor is not always compensated by getting principal, interest, and costs three years after he intended and expected. So, the damages for a personal injury from negligence, are often not a complete satisfaction for the suffering.[6]

1 Sedgwick on Damages (5th ed.) 53; Civil Proc. Code, § 187.

2 *per* Parke, B., 1 Exch. 855.

3 Sharp *v.* Brice, 2 W. Bl. 942.

4 Broom's Com. 630; Mayne on D. 10; Sedg. on D. 226.

5 Broom's Com. 852; Mayne on D. 12.

6 Mayne on D. 6; 2 Story's Eq. Jur. 1313; Sedg. on D. 35.

345. Exemplary (sometimes, but improperly, called vindictive)[1] damages can only be given in cases of tort. They are substantial damages, but are not the result of calculation, and the only scale by which they can be measured, is the application of a temperate discretion; and hence they may err in being excessive. Where the tort is to the person, or character, or feelings, and the facts disclose fraud, malice, violence, cruelty, or the like, they operate as a punishment, for the benefit of the community, and as a restraint on the transgressor.[2] Hence, the condition in life of the defendant is to be considered, since the damages are for example's sake, not as a payment, but as a penalty, and must be proportioned to the means of the offender.[3] It is sometimes said that the damages in cases of breach of promise of marriage are of this nature; but though incapable of calculation, and so discretionary, it may be doubted if the damages given, ought not to be as nearly an accurate compensation in a money form, as the subject-matter of the contract will admit of; and if so, they are substantial merely, and not exemplary. Certainly the injury is a pure breach of contract, and not a tort.[4]

Exemplary.

346. A principle common to actions on contracts and for torts, is that the damages given, must not be too remote. As to contracts the rule is generally stated thus; where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of

REMOTENESS OF DAMAGE.

1 1 Pothier on Oblig. 90.

2 Merest *v.* Harvey, 5 Taunt. 442; Thomas *v.* Harris, 27 L. J. 353 Exch.; Bell *v.* Midland Ry. Co. 7 Jur. N. S. 1200; Mayne on D. 13; Sedg. on D. 524.

3 Mayne on D. 14; Sedg. on D. 525.

4 Frost *v.* Knight, L. R. 5 Exch. 336, where it is suggested how an action in tort might be brought.

contract, should be such as may fairly and reasonably be considered as either arising naturally, that is, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.[1] This accords with the general rule laid down in Section 73 I. C. Act, but the limits of the doctrine of remoteness are to be gathered from the illustrations to the section. But the mere knowledge of circumstances which would increase the damage in the event of a breach, will not be enough, unless the defendant must be supposed to have submitted, either expressly or tacitly, to such extrinsic damages in the case of his not performing his contract.[2] There may be a difficulty on the facts of each case in tacitly implying such submission, but the principle is that whenever either the object of the one party is specially brought to the notice of the other party, or circumstances are known to the latter from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object. This seems not inconsistent with illustrations *(i)* to *(l)*, Section 73, I. C. Act, and is a reasonable qualification of the general rule.[3]

347. Hence, loss of profits which might have been made by collateral contracts, or in the performance of some prior and exceptional con-

Loss of profits when too remote.

1 Hadley *v.* Baxendale, 9 Exch. 341; Sedg. on D. 79, 82; recent examples are Wilson *v.* Newport D. Co. L. R. 1 Exch. 177; Burton *v.* Pinkerton, L. R. 2 Exch. 340.

2 Vicars *v.* Wilcox, 2 Sm. L. C. (4th ed.) 432; Home *v.* Mid. Ry. Co. L. R. 8 C. P. 131; E. A. G. *v.* Armstrong, L. R. 9 Q. B. 479.

3 Simpson *v.* L. and N. W. Ry. Co. 1 Q. B. D. 277.

tract with a third party, cannot be included in the measure of damages. Thus, if a carrier does not deliver goods until the season or opportunity for the sale of them is past, the measure of damages is the difference between the market values of the goods when they ought to have been, and when they actually were delivered; but the loss of profits which the plaintiff would have had from making the goods into articles for sale, cannot be included.[1] So, the loss of profits in a bargain of resale by a plaintiff to a third party, unless the defendant can be taken to have submitted thereto, will be too remote.[2] So, if A contracts to deliver thread to B, a maistry weaver, and from his not doing so, B's workmen remain idle, the cost of their wages, and the loss of B's possible profits cannot be included.[3] But when profits are the direct and immediate fruits of the contract between the parties, they may constitute the measure of damages. If A contracts to deliver to a district engineer ten lacs of bricks at a certain rate, and then agrees with B and others to manufacture them at a lower rate, and the engineer, in breach of his contract, refuses to receive the bricks, A's measure of damages is the profits he has lost, that is, he is to be allowed as much as the performance of the contract would have benefited him.[4] Where a passenger is put down at a wrong place, damages for the cost or inconvenience of getting to the pro-

—when included.

1 Wilson *v.* L. and Y. Ry. Co. 9 C. B. N. S. 632; 7 Jur. N. S. 862; Smeed *v.* Foord, 28 L. J. 178 Q. B.; ill. (*q*) s. 73 I. C. Act.

2 Dingle *v.* Hare, 6 Jur. N. S. 679; ill. (*o*) compared with ill. (*j*) s. 73 I. C. Act.

3 Gee *v.* L. and Y. Ry. Co. 30 L. J. 11 Exch.; Sedg. on D. 72; ill. (*p*) s. 73 I. C. Act.

4 See the American case of Masterton *v.* Mayor of Brooklyn, cited in Mayne on D. 15, and in Sedg. on D. 74—76; see ills. (*h*) and (*j*) s. 73 I. C. Act.

per place are recoverable, but not for illness or injury occurring in the course of getting there.[1]

348. In actions for torts the rule is in effect the same and it is usually said that the damages must be limited to the legal and natural consequences of the tortious act. Damage is a natural consequence of an act when it is clearly the immediate and probable result of it; but it will not be too remote, though it may not be a necessary consequence of the injury, if it is a not unnatural consequence thereof.[2] Thus, if there are two fields, an inner and an outer one, and A is bound to fence the outer one, and B's cattle, by defect of the fence, stray into the outer field and thence into the inner field, the damage which B has to pay the owner of the inner field, is not too remote, but he may recover it from A.[3] So also, if B's cattle are hurt whilst in the outer field, or whilst attempting to break into the inner field, the damage will not be too remote.[4] Again where defendant knowing plaintiff to be a farmer sold him a cow which he warranted free from disease, and she was placed with other cows which became infected and died, defendant was held liable for the entire loss as being a natural damage. But where water that would naturally have flowed away to a drain was, from a defect apart from and unknown to the defendant, spread over the surface and then frozen, the damage to plaintiff from a fall on the ice was held too remote, as not being the probable result of a wrongful act of defendant in spilling the water.[5]

Remoteness of damage in torts.

1 Hobbs v. L. & S. W. Ry. Co. L.R. 10 Q. B. 118; ill. (r) s. 73 I. C. Act.

2 Lynch v. Knight, 9 H. L. C. 577; 8 Jur. N. S. 731; Story on Agency, 217, c. to 222 contains valuable remarks on Remoteness.

3 Singleton v. Williamson, 8 Jur. N. S. 60; Sneesby v. L. and Y. Ry. Co. L. R. 9 Q. B. 266 and 1 Q. B. D. 42.

4 Singleton v. Williamson, 8 Jur. N. S. 60.

5 Smith v. Green, 1 C. P. D. 92 Sharp v. Powell, L. R 7 C. P. 253.

349. The damage will be an unnatural consequence, and, therefore, too remote, when it is caused, wholly or principally, by the act of the plaintiff himself; such act may be either wilful or negligent. Where the tort is complete, and there is no reasonable danger of its repetition, or of any further peril from it, loss resulting to the plaintiff from a line of conduct he has adopted, not necessarily but of his mere will, is a too remote damage. If a passenger has been assaulted during a voyage or journey, he may not be justified in leaving the ship or carriage; and, if he chooses to do so, the expense he incurs to complete his journey by other means, is the result of a mere wilful act, and too remote to be included in the damages for the assault.[1] The act will be negligent where the plaintiff, by his own default and negligence is really the author of his own wrong.[2] To these cases, the doctrine of contributory negligence (stated in a preceding page) should be applied.[3] Generally, that doctrine applies so as to bar the right to recover any damages at all; but it may be that the consequences of the act of the defendant are divisible, and such of them only as can be imputed to the contributory negligence of the plaintiff, will then be excluded as too remote. But this case is to be distinguished from where the result is single, and the negligence of the plaintiff did not in any degree contribute to the immediate cause of the accident; then the defendant is liable for all the damage which might reasonably have been anticipated, but not for such as he could, by no possibility, have foreseen.[4]

Damage from the plaintiff's own act.

1 Boyce *v.* Bayliffe, 1 Camp. 58.
2 Glover *v.* L. and S. W. Ry. Co. L. R. 3 Q. B. 25.
3 See ante § 123.
4 Rigby *v.* Hewitt, 5 Exch. 240; Greenland *v.* Chaplin, id. 243; dicta of Pollock, C. B.

350. But the damages must be, not only the natural, but also the legal consequences of the defendant's act. It is not a legal consequence of slander that a third party should have assaulted the plaintiff; and the defendant though guilty of the slander, ought not to be charged with the damage from the wrongful act of assault by another. But if the wrongful act of the third party was the intended consequence of defendant's act, the damage resulting from such wrongful act will not be too remote. If A maliciously procures C to break his contract with B, as not to deliver goods or to pay a debt, the damage to B is the intended consequence and not too remote.[1] But if A slanders B, who is employed under a contract by C, and third parties repeat the slander to C who, in breach of contract and wrongfully, dismisses B, this damage is too remote to be included in the consequence of A's slander; for (1) it is not a natural consequence, since the third parties were free agents; and (2) it is not a legal consequence, as the act of C was wrongful.[2] But the mere intervention of third parties will not always make a damage too remote. If A tortiously sets a dangerous instrument in motion, and third parties in self-defence, (and therefore lawfully, and not as free agents) continue the motion and B is ultimately hurt, there is a chain of effects which connects together the wrongdoer and the injured party.[3]

Damage must be a legal consequence.

351. A question connected with the doctrine of remoteness of damage, is, when there may be in-

Costs of a for-

1 Lumley v. Gye, 2 E. & B. 216.

2 Vicars v. Wilcocks, 2 Sm. L. C. 423.

3 Scott v. Shepherd, 1 Sm. L. C. 343.

mer action when included. cluded in the damages recovered for a breach of contract or for a tort, the costs which the plaintiff has been put to in bringing or defending an action against a third party. Generally, the former action or defence must have been a proper one, and also a natural consequence of the defendant's conduct.[1] If it was obvious in the former action, that there was no just defence to it, the plaintiff should have submitted, and he cannot inflame his own account against another by having incurred expenses in an unrighteous resistance;[2] and even though the plaintiff had a covenant of indemnity from the defendant against all consequences, he ought not to defend a hopeless action.[3] If the defence was merely a defective one, as where the third party's claim is partially admitted by paying money into Court, but resisted as to the rest, and there is judgment in his favor for a further sum, then, if the course pursued by the plaintiff was such as a prudent and reasonable man would take in his own case, the costs of such defence may be included in the damages recovered from the defendant in the second action.[4] Expenses incurred by a plaintiff in obtaining legal advice as to the validity of his claim are not recoverable as part of the damages.[5]

352. If a plaintiff, relying upon the pretended authority of an agent, brings a suit against the principal and is defeated, the costs may be included in the damages recovered from the agent; but notice should have been first given to such pretended agent.[6] So, if the plaintiff, before making a

1 See Sedg. on D. 84 (n.)
2 Short *v.* Kalloway, 11 A. and E. 29.
3 Walker *v.* Hatton, 10 M. and W. 259.
4 Tindal *v.* Bell, 11 M. & W. 228.
5 Clare *v.* Magnard, 7 C. and P. 743.
6 Collen *v.* Wright, 7 E. and B. 301; 8 Ibid. 647.

defence in a former action, gave notice to the defendant of the action, and he did not forbid a defence being made, he will be taken to have sanctioned it, and the costs of the defence will be recoverable.[1] But where the plaintiff might have obtained full satisfaction for the wrong done him without bringing the suit or taking the proceedings, or where the costs were incurred for some merely collateral purpose, or where the former action against the present plaintiff was brought, not merely for the wrongful act of the defendant in the second action, but also for some wrongful act of the original defendant himself, the costs incurred by the plaintiff will not be recoverable.[2] Thus where A contracts with B, and then B with C, and the contracts are separate and independent, the costs of B in defending a suit by A or some third party injured by C's negligent performance of his contract, cannot be included when B in his turn sues C on his contract, but only the damages paid to A or the third party injured are recoverable, for the costs, it is said, were incurred for a collateral purpose.[3] The order of the Court in the former action allowing or recognising the costs incurred, is conclusive as to the amount to be recovered from the defendant in the second action,[4] except when such defendant had indemnified the plaintiff, or sanctioned the former defence, when the amount of all the expenses actually incurred will be recoverable.[5]

When costs are not included.

353. Another general matter is the period of time in

1 Blythe *v.* Smith, 5 M. & Gr. 405; Rolph *v.* Crouch, L. R. 3 Exch. 44.

2 Mayne on D. 27, 30.

3 Baxendale *v.* L. C. & D. Ry. Co. L. R. 10 Exch. 42; Fisher *v.* V. Asphalte Co. 1 C. P. D. 511; but the *ratio decidendi* does not seem very satisfactory.

4 Mayne on D. 25.

5 Smith *v.* Compton, 3 B. & Ad. 407.

Period for which damages may be assessed.

reference to which damages may be assessed. No damages can be given on account of anything before the cause of action arose, but they may, in some cases, be assessed up to an indefinite period afterwards. Generally, where the action is not founded upon the damage only, so that every recurring damage would be a fresh cause of action, but upon a specific unlawful act and the damage, then prospective damages should be given, that is, such damages as in all probability, or almost to a certainty, will hereafter flow from the single unlawful act (whether breach of contract or tort), as its natural and legal consequence.[1] Thus, in a case of contract, a legal liability of the plaintiff to pay damages to a third party, by reason of the default of the defendant, is enough to enable the plaintiff to recover those damages though the money has not actually been paid by him. Thus, on a sale with a warranty by defendant to plaintiff, and a resale by plaintiff to third parties with a similar warranty, the measure of damages in action for a breach of the warranty should include what the plaintiff may probably have to pay to the sub-purchasers.[2] So, in some cases of torts, as a battery or libel, as a single recovery of damages bars a future action for the same cause though fresh damage has subsequently arisen, the measure of damages should at first comprise all probable future losses from the injury.[3]

Where there is a continuing cause of action.

354. But where there is a continuing cause of action, future damage cannot be included, for then a fresh cause for a suit arises upon each fresh damage, as in the case of a continuing

1 Mayne on D. 33. See Croft *v.* L. and N. W. Ry. Co. 9 Jur. N. S. 962; and Sedg. on D. 117, 118.

2 Randall *v.* Roper, 27 L. J. 266 Q. B; ill. (*m*) s. 73 I. C. Act.

3 Fetter *v.* Beale, 1 Salk. 11.

false imprisonment, trespass, or nuisance.[1] But there is, in truth, no continuing injury where it is not within the power of the defendant, even if it were his desire, to abate the cause of damage; thus, an act done upon the land of the plaintiff, though it may be a continuing cause of damage, is not a continuing injury, where it is in the power of the plaintiff alone at once to abate the cause of damage; in such a case the measure should be the loss sustained up to the time of judgment, and the cost of restoring the land to its original state.[2] Where the continuance is entirely within the power of the defendant, the most effective remedy is an injunction in addition to past damages.

Division of subject.

355. Such are some of the general principles applicable as well in actions on contracts as for torts. In stating the measure of damages in particular instances, it will be convenient to take first actions on contracts, and then actions for torts; and actions on contracts may be distinguished into those in which the subject-matter is land, and those in which it is personal property or personal services. Actions for torts will be taken in the order in which they have been treated in the preceding pages.

PENALTY AND LIQUIDATED DAMAGES.

356. If the parties to a contract have, by the terms of their agreement, fixed upon a particular sum as payable in the event of a breach, the question arises, whether the sum so fixed ought to be regarded as a penalty, or as an ascertained or liquidated sum, fixed and agreed on between the parties, and, therefore, the proper measure of the damages. The

1 Shadwell *v.* Hutchinson, 2 B. and Ad. 97; Holmes *v.* Wilson, 10 Ad. and E. 503.

2 Clegg *v.* Dearden, 12 Q. B. 576; Mayne on D. 37.

decision of the question (which is a question of law) does not depend so much upon the mere terms of the agreement, or the mere largeness or otherwise of the sum named, as upon the intention and object of the parties to be derived from a view of the whole contract.[1] The rules for distinguishing a penalty from liquidated damages recognised in English law may be briefly stated as follows; (1) if a sum of money is expressly called a penalty, and there is nothing to alter or control that statement, it must be so viewed; (2) where the payment of a smaller sum is secured by a larger sum, it is always to be considered as a penalty; (3) if the contract is for the performance of several things, and one large sum is stated to be paid upon any breach of performance, it is a penalty though it may be called liquidated damages; (4) if the sum is only payable on one event, and the contract is such that the precise damage from a breach thereof is not easily ascertainable, then the sum is to be taken as liquidated damages fixed to avoid the difficulty, though it may be called a penalty;[2] (5) if there are several stipulations, and the damages from the breach of some are uncertain, and from others certain, then, it seems, the sum is not to be viewed as liquidated damages in respect to any, as it is not so in respect to all.[3] In India, Section 74 I. C. Act now lays down the very simple and just rule that in every case (including also a case within the above rule) (4) nothing more

1 The authorities for this distinction are extremely numerous. See Pothier on Oblig.; 2 Story's Eq. Jur.; Chitty on Contracts, 728 *et seq.*; Addison on Contracts, 1072; Sloman *v.* Walter, 2 L. C. in Eq. 907; Norton's Topics of Jur. 139—148; Mayne on D. 63—68; 1 Bell's Com. (6th ed.) 357—360; Sedg. on D. 447—486. The decision in 2 Mad. H. C. R. 56 viewed all penalties as liquidated damages, but s. 74 I. C. Act reverses this.

2 Hinton *v.* Sparkes, L. R. 3 C. P. 161; Lea *v.* Whitaker, L. R. 8 C. P. 70; Magee *v.* Lavell, L. R. 9 C. P. 115; Parfitt *v.* Chambre, L. R. 15 Eq. 36.

3 Norton's Topics of Jur. 147; Mayne on D. 65—7; Colebrooke on Oblig. § 272—3; Sedg. on D. 479-80.

than a reasonable compensation not exceeding the amount named can be recovered. This is, in effect, to treat every sum named as a penalty; and the sole apparent exception is as to such instruments as public bail bonds to appear in Court and so on, where the entire sum named is necessarily recoverable.

Penal obligation.

357. A penal obligation is one by which a person, to assure the execution of a primary engagement, obliges himself, by way of penalty, to some other thing, in case of the non-performance of that primary engagement.[1] Hence it follows, that though equity will give a person relief against a penalty, where it is only intended to secure the performance of the contract, yet it will not permit him to resist specific performance of the contract, by electing to pay the penalty.[2] But this case is to be distinguished from where the real intent of the contract is, that a person may, if he chooses, do certain acts, upon payment of a certain sum of money; then, on the one hand, equity will not restrain the doing of such acts, and on the other hand, if they are done, the agreed sum is the only measure of damages.[3] So also, a penal obligation is to be distinguished from an alternative obligation, which is one by which a party promises disjunctively to give or to do one of two or more things, so as by giving or performing one of them, he may be acquitted of all; for then the obligor may elect which of them he will give or do.[4] Further, from both is to be distinguished a contract which is primary and single,

Alternative obligation.

Alternative faculty of payment.

1 Colebrooke on Oblig. §. 264.

2 2 L. C. in Eq. 919; French *v.* Maccale, 2 D. & War. 274; Colebrooke on Oblig. § 269.

3 2 L. C. in Eq. 920; Rolfe *v.* Peterson, 2 Bro. P. C. 436.

4 Colebrooke on Oblig. § 204, 248.

but provides for more than one mode of payment, as by paying rent in money or in kind; then the obligation is single, and only the mode of solution alternative; the option is with the debtor, and it is neither a case of penalty, nor of liquidated damages, that is, a prospectively estimated compensation for non-performance.[1]

Conditional remission.

358. Where an agreement remits an advantage, to which one of the parties is else entitled, upon a certian condition to be performed by the other; as, for example, if a creditor agrees to take a sum less than his due, provided it be punctually paid; this condition, though penal in its effect, is not considered to be in the nature of a penalty, and is rigidly binding upon the favoured party, if he do not, strictly perform the condition. It is not a penal obligation but a conditional stipulation.[2] There is a distinction, now well established in English equity, between an agreement, that the rate of interest shall be raised in default of punctual payment (which equity holds, except perhaps where the increased rate is the consideration for the forbearance of the creditor, to be in the nature of a penalty, and to be relieved against, even in case of gross default); and an agreement, that on punctual payment there shall be a reduction of interest, which, if strictly performed, but not otherwise, will be supported.[3] But it has been doubted whether, in both instances, the difference of interest be not alike subject to be treated as a penalty.[4]

Action for stated damages.

359. By English law, if the sum is the liquidated damages agreed upon and is so sued for, then that sum is the exact sum to be recovered, neither

1 Colebrooke on Oblig. § 244—7.
2 Id. § 277; Thompson v. Hudson, L. R. 4 H. L. 1.
3 Seton v. Slade, 2 L.C. in Ey. 437.
4 Colebrooke on Oblig. § 277.

more nor less; unless there has been a part execution of the principal obligation, when the sum fixed as stated or liquidated damages may be proportionately reduced.[1] But if the sum is to be regarded as a penalty, then the person injured by the breach of the covenant may either sue for the penalty, when he cannot recover more, but may recover less if the real measure of damages is less than such penal sum, and then also the recovery of the penalty will be a complete satisfaction of the covenant; or he may proceed upon the covenant, and recover more or less than the penalty, as often as there is a breach of the covenant.[2] By Section 74 I. C. Act the sum recoverable is always limited to what is a reasonable compensation not exceeding the sum named in the contract.

—for penalty.

360. In an action by the buyer against the seller on a contract for the sale of the fee simple or other interest in real property, in general only nominal damages are recoverable for the loss of the bargain; but by way of special damage any deposit may be recovered together with interest thereon, and also any expenses properly incurred by the purchaser in investigating the title. The distinction is between parties acting in good faith and failing to perform because they could not make a good title, and parties whose conduct is tainted with fraud and bad faith. In the former case money paid with interest and expenses can alone be recovered; but in the latter damages also for the loss of bargain.[3] If the seller contracts to sell an estate, knowing that he has no title to it, nor any

SALES OF LAND; buyer against seller.

1 Colebrooke on Oblig. § 280.

2 Id. § 270, 274; Lowe *v.* Peers, 2 Burr. 2228; Winter *v.* Trimmer, 1 W. Bl. 395; Harrison *v.* Wright, 13 East, 343.

3 Flureau *v.* Thornhill, 2 W. Bl. 1078; Bain *v.* Fothergill, L. R. 6 Exch. 59; and 7 H. L. 158.

means of acquiring it, the purchaser can by an action for breach of contract, recover the expenses he has incurred, and by an action for deceit other damages for loss of the bargain; and in India at least this might be done by a single suit[1] So where the seller was able to make a good title, but has refused to take the necessary steps, the buyer can recover his deposit and his expenses and also damages for loss of bargain, the measure of which is the profit which he could have made on a resale.[2] Where the sale was not a binding one, not even nominal damages can be given for the loss of the bargain.[3] Where the first purchaser has resold at a profit, the loss of such profit, and costs, and expenses of the resale, are not recoverable, unless there was bad faith on the part of the original seller.[4] Where the sale was to be completed by a specific time, expenses prematurely incurred by the purchaser on his own act, and in the absence of fraud by the seller, cannot be given as special damages.[5] Where the cause of failure arises from some other source than want of title, the plaintiff may recover as special damage any loss incurred, as, for instance, loss in his trade by not getting settled in his house.[6] In addition to a decree for specific performance of the sale, special damages arising from delay, as from deterioration, may be given.[7] The rule excluding damages for the loss of bargain in sales of real estate does not apply in the case of a lease

Lease against lessor.

1 Bain *v.* Fothergill, L. R. 7 H. L. 207; Wall *v.* City L. R. Co. L. R. 9 Q. B. 249; Sikes *v.* Wild, 7 Jur. N. S. 1280; S. C. *in cam. scacc.* 11 W. R. 954; S. C. 4 B. and S. 421; 32 L. J. Q. B. 375; Sugden's V. and P. ch. 9, s. 3; Simons *v.* Patchett, 26 L. J. 199 Q. B.; see remarks on this rule in Sedg. on D. 200.

2 Engel *v.* Fitch, L. R. 3 Q. B. 314; id. 4 Q. B. 659; Godwin *v.* Francis, L. R. 5 C. P. 295.

3 Mayne on D. 92.

4 Walker *v.* Moore, 10 B. and C. 421.

5 Hodges *v.* Lichfield, 1 Bing. N. C. 492.

6 Ward *v.* Smith, 11 Price 19; Duckworth *v.* Ewart, 10 Jur. N. S. 214.

7 Chinnock *v.* Ely, 11 Jur. N. S. 32.

granted by one who has no title to grant it, but the general rule applies that where a contract is broken the person injured is to be placed as far as money can do it, in the same position as he would have been in if the contract had been fulfilled.[1] The general remedy, where a lessor could make a good lease, and there has been a breach of the agreement to grant one, is a suit for specific performance; but in an action for damages for breach of such covenant, the measure would seem to be any expenses properly incurred by the plaintiff on the faith of the contract being duly executed, together with compensation for the loss of the lease, that is, not the profits which he would or might have made if he had been tenant under the lease, but the value of the term to him at the time of the breach, or, in other words, a compensation for the loss of his bargain.[2] The measure will be the same where the lessor had not any colour of title to the premises intended to be demised.[3]

Seller against buyer.

361. An action by the seller against the purchaser for refusal to complete his contract, stands on the same footing as an action for not accepting goods.[4] If the estate has been actually conveyed and become the property of the buyer, the measure is the price agreed to be paid with interest thereon. If it remains the property of the seller, the measure is the difference between the price agreed on, and its market value; for the question then is, how much worse is the plaintiff by the diminution in the value of the land, or the loss of the purchase money; but the plaintiff cannot have both the land and the money

1 Lock *v.* Furze, L. R. 1 C. P. 441.

2 Locke *v.* Furze, 11 Jur. N. S. 726; S. C. on appeal L. R. 1 C. P. 441 and see Spedding *v.* Nevill, L. R. 4 C. P. 212.

3 Williams *v.* Burrell, 1 C. B. 402.

4 Mayne on D. 94; Sedg. on D. 205.

also.[1] Costs and charges fairly incurred by the plaintiff for the purpose of the sale may be included as special damages. Where there is no difference between the price and market value, then costs and nominal damages for the breach constitute the measure.[2] If the buyer has been in possession, and then abandons the contract, there should be added to the above, interest on the purchase money whilst he was in possession.

362. The sale may be complete, but there may be a failure as to some of the usual covenants; as the covenant for title. If the interest conveyed is not so large as warranted, or the tenure of the land not so advantageous, the measure of damages is the difference between the value of the thing as it is, and its value as it was warranted to be.[3] If the defect is not in the quantity of the interest, but the quality of the title, as where a saleable title has not been acquired, but only the sellers possessory title, then the fair rule would be to give the plaintiff such damages as will compensate him for the defective quality of his title, or any amount paid to perfect the title with interest thereon.[4] Where there is a breach of the covenant for quiet enjoyment, and the buyer is subsequently evicted by one with a better title, then if the sale was of a lease or interest for a term of years, the measure of damages is the value of the unexpired part of the term, and the amount of any damages recovered against the plaintiff by the ejector as mesne profits without interest, and any costs properly incurred in com-

Breach of covenant as to title.

—for quiet enjoyment.

1 Laird *v.* Pim, 7 M. & W. 474.
2 Addison on Contracts, (5th ed.) 1053.
3 Mayne on D. 96.
4 Id. 97.

promising a suit brought to eject the plaintiff.[1] If the sale was of the fee simple, and there has been no alteration in the value of the land, the damages would be the purchase money paid, with interest thereon (unless perhaps there has been a beneficial possession of the land),[2] together with costs and expenses. Any increase of value, or improvements made after the sale would not be included in the damages, if the increase arose from some entirely collateral cause, as the formation of a railway; or if the improvements, though made with the plaintiff's capital, were not the express object of the contract, and so the fair and contemplated consequence of it.[3] The buyer then loses the difference between the improved and unimproved values of the estate; in some cases he who evicts may be liable for this, as will be seen in the section on adverse occupancy.[4] But this is in the absence of fraud; fraud will render the seller liable for all losses or improvements. If the thing is diminished in value, then the value at the time of eviction is, it seems, the measure, for that is the loss suffered; and profits from improvements ought always to be set off against the outlay, and the difference only allowed; for it is enough if the buyer loses nothing.[5] If the eviction is from a specific part only of the land, then the measure is the value of that part; if from an undivided share of it, then a proportionate part of the purchase money.[6] When there is a breach of the covenant against incumbrances, the measure is the whole

—against incumbrances.

1 Williams v. Burrell, 1 C. B. 402; Locke v. Furze, 11 Jur. N. S. 726.

2 Mayne on D. 97; Domat, B. 1 T. 2, s. 10, § 12, 13.

3 Mayne on D. 98, 99; Domat, ibid. § 15, 16; Sedg. on D. 169—173.

4 Infra § 396.

5 Domat. B. 1 T. 2, s. 10, § 14, 17, 18, 19.

6 Mayne on D. 100; Sedg. on D. 183.

amount of any existing incumbrances, which is needed to discharge them.[1]

363. Next as to contracts relating to the tenancy of land, and first as to rent for use and occupation. Where a rent is fixed in an agreement (though one void for want of form), that is the measure, with interest from the date of its being due;[2] otherwise, if there is no permanent agreement, or it has not been acted up to, then a fair rent is to be fixed with reference to the present beneficial interest of the tenant, but omitting any increased value from an outlay of the tenant's own capital, and allowing for ordinary repairs if made by the tenant and also deducting any sums properly paid in exoneration of the landlord, as taxes, &c.[3] Rent does not, like interest, accrue from day to day, but is payable at the end of a term; so that on eviction of the tenant, rent is not apportioned rateably in respect to the time;[4] but if the eviction is from part only of the land, it is apportioned in respect to the land, unless the eviction was by the lessor; then, as quiet enjoyment is a condition precedent to the tenant's liability for rent, there is a suspension of the entire rent, till he is reinstated.[5]

Action for rent.

364. On the breach of a covenant by the tenant to repair, the measure of damages, in an action brought during the tenancy, is the extent to which the marketable value of the reversion is injured.[6] This

Action for non-repair.

1 Lethbridge *v.* Mytton, 2 B. & Ad. 772; Sedg. on D. 189.
2 De Medina *v.* Polson, Holt, 47; Woodfall's L. & T. (7th ed.) 634.
3 Mayne on D. 128, 132.
4 Tudor's L. C. on R. Pro. 181; Woodfall's L. & T. 340.
5 Morrison *v.* Chadwick, 7 C. B. 266; Tudor's L. C. on R. Pro. 198; Woodfall's L. & T. 338, 346.
6 Worcester School *v.* Waters, 9 C. & P. 724; Smith *v.* Peat, 9 Exch. 161.

would be very great if the lease is near its end; very small if it had a long time to run.[1] If a mesne landlord, to save a forfeiture to the head landlord, makes repairs, the measure is the cost so far as it was necessary.[2] One of several successive assignees of a lease, who held the premises whilst out of repair, may be assessed with the whole amount, unless he shows how much only occurred in his time.[3] But the plaintiff must always give strict proof of the amount of disrepair.[4] In an action at the end of the term, the measure is the sum that will put the premises into the state of repair in which the tenant was bound to leave them; and this depends upon the age and class of house, and its state at the time of the demise; natural wear and tear is the landlord's loss, and an old building need not be turned into a new one, or left of more value at the end than at the beginning of the term; and against the cost of repairs is to be set off the amount of such increase of value.[5] Where the lessor is the party bound to repair, the lessee's cost of procuring another house whilst his own was uninhabitable, or under repair, is not to be added as special damage, except for the time during which the lessor delayed to begin the repairs.[6] It may be useful in India to know, that the neglect of the landlord to repair the house is no defence in an action by him for the rent; his covenant to repair, and the tenant's covenant to pay the rent, are independent.[7] When a loss has been incurred by the breach of a

—for not insuring.

1 Mayne on D. 133.
2 Colley v. Streeton, 2 B & C. 273; Woodfall's L. & T. 445; Addison on C. 1064.
3 Smith v. Peat, supra.
4 Smith v. Douglas, 16 C. B. 31.
5 Payne v. Haine, 16 M. & W. 541; Yates v. Dunster, 11 Exch. 15; Gutteridge v. Munyard, 1 M. & Rob. 336; Mayne on D. 137; Addison on C. 338.
6 Green v. Eales, 2 Q. B. 225.
7 Weigall v. Waters, 6 T R. 488; Addison on C. 329; Chitty on C. 310.

covenant to insure premises, the real value of the things lost will be the measure of damages.[1] Where there has been no loss, the plaintiff will recover premiums, if any, paid by him to keep up the policy, or the expense of effecting a new one.[2]

SALES OF CHATTELS.

Action for the price.

365. Next as to contracts for the sale of chattels; where the buyer has received the goods, the measure is the price, either as fixed by the contract, or to be fixed by ascertaining the fair value of the article.[3] If the seller is only able to prove the delivery of a package, without any evidence of its contents, it will be presumed, as against him, that it was filled with the cheapest commodity in which he deals.[4] If the article is agreed to be sold at a certain price, that is the measure; and though materials superior to those contracted for are used, the purchaser is neither bound to pay the higher price, nor to return the article.[5] Generally, interest is not to be given on the price of goods sold, even though to be paid for on a particular day; but if they were to be paid for by a bill at a certain date, and the bill is not given, interest should be given from the time the bill would have become due.[6] Where the article differs in quality or description from that contracted for, but has been kept by the buyer, then generally the measure is its real value, that is, so much as the seller could have sold it for, if he had taken it back, which is not necessarily the same as what it is worth to the buyer in its present condition.[7] But the reduction is limited to this difference in

Reduction of the price.

1 Mayne on D. 141.
2 Id. 143.
3 Addison on C. 1057.
4 Chunes *v.* Pezzey, 1 Camp. S.
5 Wilmot *v.* Smith, 3 C. & P. 455.
6 Farr *v.* Ward, 3 M. & W. 25.
7 Mayne on D. 43.

value between the article as it was at the time of delivery, and as it ought to have been according to the contract; any special damage subsequently arising from the breach of contract ought not to be taken into account, but is ground for a cross-action by the buyer.[1] So, if the action is not for the price, but on bills given in payment, then only a total failure of the consideration is a defence for the buyer; a partial failure cannot be allowed for in reduction of damages, but is only ground for a cross-action; the contract may be divisible, but the security is entire.[2] If the buyer could not return the article, as where it was made out of his own materials, the cost of altering it would be the only fair measure of reduction; and this might be the measure even where the article might have been returned, if the impossibility, or cost or delay of procuring another render the outlay on alterations a reasonable and prudent expenditure.[3]

Action for not accepting goods.

366. In an action for not accepting goods, the difference between the contract price and the market price, on the day the contract was broken, together with any expenses necessarily incurred by the seller in fulfilling his part of the contract, is the ordinary measure of damages.[4] Where there is no difference, or it is in favor of the plaintiff, damages can only be nominal.[5] Where the defendant has ordered goods, and then wrongfully countermanded the order, and thereupon the vendor ceases to manufacture them, he is entitled to damages for the goods in hand, and to the damages for which he is liable to subcontractors or like claims against him; he is also entitled to

1 Mondel *v.* Steel, 8 M. & W. 858.
2 Tye *v.* Gwynne, 2 Camp. 347.
3 Cutler *v.* Close, 5 C. & P. 337; Mayne on D. 44; Thornton *v.* Place, 1 M. & Rob. 218.
4 Boorman *v.* Nash, 9 B. & C. 145; Boswel *v.* Kilborn, 8 Jur. N. S. 443; Addison on C. 1057; s. 73, ills. *(c) (d)* I. C. Act.
5 Valpy *v.* Oakely, 16 Q. B. 941.

such profit as he would have made if the contract had been fully carried out; that is, in effect, to both the loss accruing, and the profits intercepted.[1] Where the property in goods has passed, though there has been no delivery, the seller may treat the contract as existing, and recover the price.[2] The above rules apply to a sale of stock or shares, as well as of goods.[3]

367. Where the buyer sues the seller for non-delivery, and he has paid nothing in advance, the measure is the difference between the contract price, and that of goods of a similar description and quality at the time when they ought to have been delivered; for the plaintiff might have bought such immediately on the breach.[4] Where delivery is to be between certain dates and a fine is fixed for non-delivery, the fine begins from the last date fixed for delivery.[5] Though there was a day fixed for delivery, if there was a previous utter renunciation of the contract by the seller, the plaintiff may elect to sue at once, and the measure will be the difference between the contract price, and the price on the day of breach;[6] or if the defendant has resold the goods, the difference between the price at which they were resold.[7] Where the delivery is to be by fixed instalments, and there is a breach before the time for complete performance, the plaintiff may claim as damages the difference between the market and contract

Action for not delivering goods.

1 Cort *v.* Ambergate Ry. Co. 17 Q. B. 127; Dunlop *v.* Higgins, 1 H. L. C. 381; s. 73, ill. (*h*) I. C. Act.

2 Graham *v.* Jackson, 14 East, 498. So also in America, Sedg. on D. 314.

3 Mayne on D. 83.

4 Chinnery *v.* Vial, 5 H. and N. 288; Dingle *v.* Hare, 6 Jur. N. S. 679; Williams *v.* Reynolds, 11 Jur. N. S. 973; s. 73, ill. (*a*) I. C. Act.

5 Berghain *v.* Blarnavon I. Co. L. R. 10 Q. B. 319.

6 Hochster *v.* De Latour, 2 E. and B. 678; Frost *v.* Knight, L. R. 7 C. P. 111.

7 Greaves *v.* Ashlin, 3 Camp. 426.

prices at the several periods for delivery, and he is not bound at the date of breach to enter into a new contract for the remaining instalments.[1] If there is a forbearance at the request of the seller to go into the market and purchase other goods, the damages are the difference between the contract price and the market price when the buyer does go into the market.[2] If the article is not one procurable at pleasure, as a machine for a specific purpose, the direct and contemplated loss from non-delivery will be special damage; but this will not extend to such a remote damage as a loss from a fall in the market prices, or loss of profit on a resale,[3] but will include the loss by the deterioration of the plaintiff's goods damaged by the non-delivery of the article.[4] Where the precise goods are not procurable at the due date of delivery, the difference in the price of similar but better goods necessarily bought in lieu of them, may be recovered as damages.[5] If there is no market for the sale of such goods at the place of delivery, the damages are the price at the place of manufacture with cost of carriage, and a reasonable sum for importer's profits.[6] Where there has been a payment in advance, the plaintiff may recover the money paid with interest; or else the price which the goods would have fetched at the time they ought to have been delivered, or at the time when otherwise the breach of contract was complete;[7] the first measure puts him into the same position as if the contract had never been

1 Brown *v.* Muller, L. R. 7 Exch. 319; Roper *v.* Johnson, L. R. 8 C. P. 167.

2 Ogle *v.* Vane, L. R. 2 Q. B. 275; id. 3 Q. B. 272.

3 Borries *v.* Hutchinson, 11 Jur. N. S. 267; Williams *v.* Reynolds, id. 973.

4 Smeed *v.* Ford, 28 L. J. 178 Q. B.

5 Hinde *v.* Liddell, L. R. 10 Q. B. 265.

6 O'Hanlan *v.* G. W. Ry. Co. 34 L. J. 154 Q. B.; 11 Jur. N. S. 797.

7 Startup *v.* Cortazzi, 2 C. M. and R. 165.

entered into, and the latter as if it had been duly carried out. Where there has been a written contract, evidence may not be given that part of the price was in consideration of delivery by a certain date.[1] Where there has been an advance, and also a delivery but of inferior goods, and the buyer seeks to recover his loss, the measure is the difference between the value of goods of the quality contracted for at the time of delivery, and the value of the goods actually delivered.[2] Where stock or shares have been lent, which is in effect an advance, then in an action for not replacing them; the damage is not limited to the price at the time of breach, but may be the price at the time of trial,[3] but not the highest price at any intermediate day, for it is a mere speculation that the plaintiff would have sold on that day.[4]

Action for breach of warranty.

368. On a breach of warranty without fraud, the English law does not allow the buyer, where the property has passed to him, to rescind the contract, and revest the property, but the remedy is by an action for a breach of the warranty;[5] and it is the same by Section 117 I. C. Act. But the Roman law allowed the thing to be returned with its increase, and the purchaser to recover the price paid with interest.[6] In an action for a breach of warranty (the goods being retained), the measure is the difference between, not the contract price, but their market value with the defect at the time of delivery, and the value they would have possessed had they

1 Bradey *v.* Oastler, 11 Jur N. S. 22.

2 Loder *v.* Kekule, 27 L. J. 27 C. P.

3 Owen *v.* Routh, 14 C. B. 327.

4 M'Arthur *v.* Seaford, 2 Taunt. 257.

5 Street *v.* Blay, 2 B. & Ad. 462. So also in America, Sedg. on D. 319.

6 Domat, B. 1 T. 2, s. 2, art. 8; see Heilbutt *v.* Hickson, L. R. 7 C. P. 439, 456.

answered the warranty.[1] Where goods are sold as being of a specified description, although the buyer may have bought them by sample, or after inspection of the bulk, there is an implied warranty that they shall be of the particular quality in a merchantable condition, and the measure of damages is the same.[2] If resold before the defect is known, the price realized may be taken as the market price if they had been sound; and if resold a third time, the defect being known, the price realized may be taken as the actual value, and the difference between the two prices as the measure of damages for the breach.[3] Hence, if on the resale before the defect was known, there was a profit, this difference cannot afterwards be recovered as special damages.[4] Where the known purpose of the contract was the resale of the goods in a foreign market, then the prices of them as sound and unsound are those in that market.[5] Where part of the goods has been returned after payment for them, and part not accepted on account of defects, the buyer may recover what he has paid and his charges, together with his profits upon the whole quantity lost from his not being able to carry out his known contract for resale of the goods.[6] Where there has been fraud, special damage may be recovered in an action for deceit.[7] If the buyer gives notice to the seller to take back the goods, and he refuses, the net expense of keeping them for a reasonable time, till a resale may be given as damages.[8] If a buyer pro-

1 Clare v. Maynard, 6 Ad. & E. 519; Mayne on D. 88; Addison on C. 1060; Sedg. on D. 319, 324; but see Chitty on C. 421; Roscoe's Ev. N. P. 321, and Dingle v. Hare, 6 Jur. N. S. 679.

2 Jones v. Just, L. R. 3 Q. B. 197; s. 113 I. C. Act.

3 Clare v. Maynard, supra.

4 Ibid. Cox v. Walker, 6 Ad. & E. 523 (n).

5 Bridge v. Wain, 1 Stark. 504.

6 Heilbutt v. Hickson, L. R. 7 C. P. 455.

7 Langridge v. Levy, 2 M. & W. 519.

8 Caswell v. Coare, 1 Taunt. 566; Chesterman v. Lamb, 2 Ad. & E. 129.

perly relying on a warranty resells with a warranty, a special damage, as the costs of a suit by the sub-purchaser, and which it was proper for him to defend, may be given;[1] and where A sold to B knowing that he bought to resell, and B resold with a like warranty, the difference between the real value and the contract price (perhaps taken to be the market value of sound goods) was given, though only one sub-purchaser had recovered from B.[2] So, an outlay by the buyer on the goods contemplated at the time of sale, may be recovered if it has become useless.[3]

369. Where the action is for the value of work and labor bestowed upon any object, the right of the workman to recover at all often depends upon such questions as, whether the entire performance of the contract is a condition precedent or not; what is the effect of a destruction of the article before payment; whether the work is subject to the approval of the employer; what is the effect of the work being, from negligence, more or less useless; or, what is the effect of an acceptance of defective work. But a consideration of the right to recover is beyond the object of this chapter. When the contract has not been fully carried out by the workman, but the employer has and retains the benefit of a part performance, and the contract is divisible, the measure of damages is the residue of the full sum agreed to be paid after deducting such an amount as will enable the defendant to get the contract completed according to the original intention of the contracting parties.[4]

ACTION FOR WORK AND LABOR.

1 Lewis *v.* Peake, 7 Taunt. 153; Hughes *v.* Grœmer, 33 L. J. (N. S.) Q. B. 335; s. 73, ill. *(m)* I. C. Act.

2 Dingle *v.* Hare, supra. 7 C. B. N. S., 145; Randall *v.* Roper, E. B. & E. 84.

3 Mayne on D. 91.

4 Thornton *v.* Place, 1 M. & Rob. 218; Addison on C. 1064; Sedg. on D. 240, 251.

If the contract has been imperfectly performed, and the subject of it cannot, or ought not to be returned, but should be altered, a like deduction may be made for alterations;[1] or if the workman has been paid in advance, that is the measure of damages recoverable from him, which may be either sued for in a cross action, or set off in an action for the price of the work.[2] So, if the plaintiff contracted to do the work and supply materials for a fixed sum, and the defendant afterwards find some of the materials, a deduction is to be made for the fair value thereof.[3] Where the failure was not on the part of the plaintiff, but from some act of the defendant, the plaintiff will recover as damages a fair remuneration for his work.[4] And generally where service has been rendered but not really under a contract, the reasonable value of the service, and not what one party gave notice he would claim, is the rule of damages.[5] Where there has been delay in performing the work, as in the repairing of a ship, the hirer is entitled to the direct loss from such delay, as the net profit which might have been earned if the ship had been duly delivered.[6] The right to recover at all for extras is often a nice question; where there is a right, the measure will be the fair market value of such extra work.[7] Where the contract has been deviated from in the performance, the contract rates are still the rule for payment as far as the contract can be traced; but if there has been a total deviation, then the whole work is to be paid for at the usual rates of charging.[8]

1 Cutler *v.* Close, 5 C. and P. 339; *In re* Trent & H. Co. L. R. 6 Eq. 499.

2 S. 73, ill. (*f*) I. C. Act; Davis *v.* Hedges, L. R. 6 Q. B. 687.

3 Newton *v.* Forster, 12 M. & W. 772.

4 Planché *v.* Golburn, 8 Bing. 14. See notes to Cutter *v.* Powell, 2 Sm. L. C. 1; Sedg. on D. 245.

5 Sedg. on D. 254.

6 *In re* Trent and H. Co. L. R. 6 Eq. 409.

7 Robson *v.* Godfrey, 1 Stark. 275.

8 Pepper *v.* Burland, Peake, 103; Sedg. on D. 242.

Generally, interest is not to be given in an action for work and labor.[1]

370. Similarly in cases of contracts for the hiring of personal services, the right to recover at all is often a nice question, as may be also what is the proper time for bringing the action.[2] Where there is a right to recover, the servant may sue not only for the value of services rendered, but also for his loss in being prevented from entering upon or continuing his service.[3] In respect to past services, the measure is the wages agreed upon; the damages for not taking into service, or for wrongful dismissal during service, are what the servant deserves; and to estimate the amount, all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the time of trial, is to be looked to; the damages are to be an indemnity for the loss, and if he has, or might have, found other equally eligible employment, the damages will be small; but if not, they might far exceed the salary agreed to be paid.[4] The degrees of misconduct or incapacity which justify a dismissal are various, but they concern the right to recover. In the case of menial servants, usage has established the right to dismiss them at any time, by giving them a month's notice or a month's wages; and a month's wages are to be taken as the agreed damages.[5] If a servant misconducts himself, the master may turn him away without any warning; and such misconduct is a forfeiture of

ACTIONS FOR PERSONAL HIRE.

1 Trelawney *v.* Thomas, 1 H. Bl. 303; Act 32 of 1839.

2 On this see Cutter *v.* Powell, 2 Sm. L. C. 1, and cases in notes.

3 Goodman *v.* Pocock, 15 Q. B. 576; Smith *v.* Hayward, 7 Ad. and E. 544.

4 Hochster *v.* DeLatour, 2 E. and B. 678; Elderton *v.* Emmens, 6 C. B. 178; 13 C. B. 495; Goodman *v.* Pocock, supra; see Hochster *v.* De Latour discussed in Frost *v.* Knight, L. R. 5 Exch. 322, and 7 Exch. 111.

5 Beeston *v.* Collyer, 4 Bing. 313.

the wages accruing due to him since the last pay day.[1] In the special contract of service for a term of years, as of an apprentice or articled clerk, where a premium is paid, if either party dies during the term, the other cannot recover damages for the loss of the services or premium.[2]

Actions as to carriage of goods.

Carrier against shipper.

371. Next as to actions by and against carriers of goods; these, so far as they are for mere breaches of contract, are generally regarding carriage by sea. Where the entire ship is engaged for a specific price, that is the measure, though only part of the ship is filled.[3] Where the ship-owner stipulates for a full cargo, that means (in the absence of fraud) according to the actual, and not merely nominal, tonnage, and he is entitled to full freight, as if full cargo had been put on board;[4] but if subsequently to the breach of contract to supply a full cargo, the shipmaster has been offered a cargo and has refused it, or has neglected an opportunity of receiving cargo and earning freight, the measure of damages will be the amount of freight which would have been earned (less the expenses of earning it,) if the contract had been fulfilled, minus what the shipmaster might have earned, if he had thought fit.[5] But where a sum certain is to be paid on not supplying a cargo, and it has become payable, subsequently earned freight is not to be deducted.[6] Where the contract is to ship certain goods at certain rates, and other goods are sent, the measure is the average freight

1 Spain *v.* Arnott, 2 Stark. 256; Ridgway *v.* Hungerford, M. Co. 3 Ad. and E. 171.

2 Whincup *v.* Hughes, L. R. 6 C. P. 78.

3 Abbott on Shipping, (10th ed.) 311.

4 Hunter *v.* Fry, 2 B. & Ald. 421; Barker *v.* Windle, 6 E. & B. 675.

5 Smith *v.* M'Guire, 27 L. J. 465 Exch.; Harries *v.* Edmonds, 1 Car. & K. 686; Sedg. on D. 405.

6 Bell *v.* Puller, 2 Taunt. 285; Staniforth *v.* Lyell, 7 Bing. 169.

for a like quantity of the specified goods.[1] If some of the specified goods are limited in quantity, and that has been shipped, the measure is the average freight on the other specified goods.[2] The agreed scale of bulk, &c., for specified goods must be applied in estimating the freight on substituted goods, though it may not be a correct standard of measurement.[3] The freight is generally to be calculated on the measurement of the goods at the time of shipment, and not at the time of delivery.[4] Where there is a refusal to accept delivery of the cargo, the sum to be earned as freight is the measure of damages.[5]

Shipper or sender against carrier.

372. In actions by the shipper against the carrier for not taking the goods, the measure is the expense actually and necessarily incurred; if no other conveyance was procurable, then the measure would be such loss from the cargo being left behind, as was the natural and probable consequence, and within the contemplation of the parties; where another ship was procurable, the damage is the increased rate of freight then payable.[6]

—for delay in delivery.

In an action against a carrier for delay in delivering goods, the measure of damages is the difference between the market value of the goods at the time when they ought to have been delivered, and when they actually were delivered; and the value is that at the place to which they were consigned.[7] Where goods were lost

1 Capper *v.* Foster, 3 Bing. N. C. 938; Abbott on Shipping, 181—3.

2 Cockburn *v.* Alexander, 6 C. B. 791.

3 Warren *v.* Peabody, 8 C. B. 800.

4 Buckle *v.* Kroop, L. R. 2 Exch. 125.

5 Stewart *v.* Rogerson, L. R. 6 C. P. 424.

6 Walton *v.* Fothergill, 7 C. & P. 394; Hadley *v.* Baxendale, 9 Exch. 341; s. 73, ills. (*b*) and (*g*) I. C. Act.

7 Wilson *v.* L. & Y. Ry. Co. 9 C. B. N. S. 632; 7 Jur. N. S. 862; Rich *v.* Baxendale, 30 L. J. 371 Exch.. and see O'Hanlan *v.* G. W. Ry. Co., ante § 367; s. 73, ill. (*c*) I. C. Act.

and could not be at once replaced, the cost of replacing them with interest thereon as compensation for the delay was held to be the measure of damages.[1] The loss by a deterioration from neglect may also be added,[2] but not the loss of profit which the plaintiff would have derived from making up the goods, and selling them in another shape;[3] nor the loss of the bargain between the plaintiff and the consignee, who had refused the goods because the delivery was too late,[4] nor such a loss as the wages or profits lost by the stoppage of a mill or factory;[5] nor the loss of an opportunity for sale by reason of the sender's agent having left the place before delivery;[6] nor the hotel expenses of an agent kept waiting for a parcel delayed by a carrier, who was not informed of the purpose for which it was intended.[7] Where notice and a special contract can be shown, losses otherwise too remote, may be included as having been contemplated.[8] If in consequence of the delay, or erroneous information of the carrier, a passenger is obliged to hire another conveyance, or stop a night on the road, the expenses may be recovered; but generally damages cannot be given for consequent derangement or loss of business, trouble, or inconvenience.[9] The expenses recoverable are only such as it was reasonable to have incurred, the test being what according to ordinary habits of society a person would, in the circumstances, have

Passenger against carrier.

1 B. C. Co. *v.* Nettleship, L. R. 3 C. P. 499.
2 Collard *v.* S. E. Ry. Co. 7 Jur. N. S. 950.
3 Wilson *v.* L. & Y. Ry. Co. supra, s. 73, ill. (*q*) I. C. Act.
4 Simmons *v.* S. E. Ry. Co. 7 Jur. N. S. 849; s. 73, ill. (*o*) I. C. Act.
5 Gee *v.* L. & Y. Ry. Co. 6 H. & N. 211; s. 73, ill. (*p*) I. C. Act.
6 G. W. Ry. Co. *v.* Redmaque, L. R. 1 C. P. 329.
7 Woodger *v.* G. W. Ry. Co. L. R. 2 C. P. 318.
8 Hadley *v.* Baxendale, 9 Exch. 341; Black *v.* Baxendale, 1 Exch. 410; Mayne on D. 154.
9 Hamlin *v.* G. N. Ry. Co. 26 L. J. 20 Exch.; Sedg. on D. 407 (n); s. 73, ill. (*r*) I. C. Act.

naturally incurred at his own cost.[1] Other causes of action against carriers chiefly arise out of negligence, and may be more correctly and conveniently classed among torts.[2]

TELEGRAPH COMPANIES.

372 *a*. The question of the liability of telegraph companies for delay, default or error in transmitting telegrams has been much discussed in America; in some cases they have been treated as common carriers and held liable for all losses resulting from the error or defect; in other cases the measure of damages has been limited to the price of the dispatch and the expense necessarily incident to sending it, and suits by the receiver as well as by the sender of the message have been allowed.[3] In England it has been held that the receiver of a telegram (the sender not having been his agent) cannot sue for loss arising from error therein, but only the sender, with whom alone the contract is made, can sue.[4] It has also been held that the sender of the message is not liable to the receiver of it for loss arising from a mistake made by the telegraph clerk in the transmission of the message.[5] Where the defendant whose business it was to collect and forward telegrams, had negligently omitted to forward one which was in cipher, and so unintelligible to him, the sender, it was held, could recover only nominal damages and not a loss of commission which was consequent upon the omission.[6]

ACTION OF DEBT.

373. Where the action is to recover a sum certain, whether as money paid by the plaintiff to the use of the defendant, or as money lent

1 Le Blanche *v.* L. and N. W. Ry. Co. 1 C. P. D. 287.

2 See infra § 415.

3 Sedg. on D. 408—14.

4 Playford *v.* U. K. E. T. Co. L. R. 4 Q. B. 706.

5 Henkel *v.* Pope, L. R. 6 Exch. 7.

6 Sanders *v.* Stuart, 1 C. P D. 326.

by the plaintiff to the defendant, or as money had and received by the defendant to the use of the plaintiff, or as the balance due upon an account stated, the plaintiff will not necessarily recover more than nominal damages for the detention of the money.[1] One of the most obvious sources of damage is the loss of interest upon the sum due; and this is the only damage that can be given, the amount of the debt with interest and costs being always deemed a sufficient compensation, though, in truth, it sometimes is not so.[2] As a general principle, interest is allowed by law only upon mercantile securities; or in those cases where there has been an express promise to pay interest; or where such promise is to be implied from the usage of trade, or other circumstances.[3] It is necessary to distinguish when interest is recoverable as interest, and when as damages;[4] in the former case, if properly claimed in the plaint, it is recoverable of right, and the rate will be what the plaintiff proves that he is entitled to; in the latter case, it may be laid as special damage up to the date of the suit, and then it is for the Court to allow it, and if so, to assess the rate and amount. By Act 32 of 1839 interest at the current rate may, at the discretion of the Court, be allowed on debts or sums certain from the date on which they became due if payable by virtue of a written instrument at a time certain, or if payable otherwise then from date of demand with notice that interest will be required.[5] Act 23 of 1861, Section 10,[6] allows the Court,

When interest is payable.

1 Wilde *v.* Clarkson, 6 T. R. 304.

2 2 Story's Eq. Jur. 1313; Reynolds *v.* Pitt, 19 Ves. 140.

3 *per* Abbott, C. J. in Higgins *v.* Sargent, 2 B. & C. 249.

4 Mayne on D. 72.

5 This Act is copied from s. 28 of the 3 and 4 W. 4, c. 42; see Mowatt *v.* Londesborough, 4 E. and B. 1.

6 This Act is to be read as part of the Code of Civil Procedure.

when the suit is for a sum of money due, to order interest, at such rate as the Court may think proper, to be paid on the principal sum adjudged from the date of suit to the date of decree, in addition to any interest adjudged on such principal sum for any period prior to the date of suit; with further interest on the aggregate sum so adjudged, and on the costs of the suit, from the date of the decree to the date of payment.[1]

374. Mercantile securities will be noticed hereafter.[2]

When interest is agreed to be paid.

Where there is an express agreement, the rate of interest is that fixed thereby. It seems that, by English law, where there is a bond for money with a penalty, interest will be allowed though not expressly stipulated for, as the penalty was to secure against damage; but then no more than the amount of penalty and costs can be recovered on such a bond; because the penalty ascertains the damages by consent of the parties.[3] But if interest was stipulated for, then it may be given beyond the penalty.[4] If the sum is not a penalty but liquidated damages, that is the agreed sum, and the Court cannot assess damages where the parties themselves have fixed them.[5] By Indian law this is immaterial, as in no case can more than a reasonable compensation not exceeding the amount named in the contract, be recovered.[6] A promise to pay interest may be implied, as from a course of dealing between the parties, or an established custom;[7] in this

When it is implied.

1 As to why compound interest should not be given, see Lindley on Juris., XCI.

2 See Infra, § 378.

3 White *v.* Sealy, Dougl. 49.

4 Francis *v.* Wilson, Ry. and M. 105.

5 Low *v.* Peers, 4 Bur. 2229.

6 S. 74 I. C. Act.

7 Ferguson *v.* Fyffe, 8 Cl. and Fin. 121.

way even compound interest may be charged, as long as the accounts remain open, if the defendant knew of the practice;[1] but the principal alone of the last balance without interest can be recovered.[2] Where there was a promise to pay by a bill or note, which would have borne interest, and it is not given, the debt will bear interest from the time the bill or note would have been due.[3] In all other cases interest may be recoverable as damages, but not as interest. It may be doubted whether where payment is delayed by an obligor, interest ought not to be given equally whether the obligation is *ex contractu* or *ex delicto*.[4]

375. A frequent defence to an action of debt is a plea of set-off. This right of a defendant to prove the amount of a debt due to himself, in reduction of his liability for the debt sued for, is known to the English law as the right of set-off, and is regulated by statute;[5] but it is a universal right recognised by all laws, and is termed by the Roman law, compensation. But the doctrine of compensation differs from, and is very superior to, that of set-off; by the former one debt proportionately extinguishes the other debt, by mere operation of law, from the moment that the reciprocal obligations co-exist; but by the latter, there is no extinction till the right of set-off is exercised as a defence in an action. Hence, by compensation, an originally large debt may be reduced within an inferior jurisdiction, as that of a Court of Small Causes; a debt carrying interest may be in part extinguished by a debt

Set-off and compensation.

1 Moor *v.* Voughton, 1 Stark. 487; Bruce *v.* Hunter, 3 Camp. 467.

2 Attwood *v.* Taylor, 1 M. and Gr. 279.

3 Slack *v.* Lowell, 3 Taunt. 157.

4 The Northumbria, L. R. 3 Adm. and Ec. 10.

5 2 Geo. 2, c. 22, s. 13 and 8 Geo. 2, c. 24. See C. Civ. Pro. s. 121.

not carrying interest, so that interest would be recoverable on the balance only; or one debt may be, wholly or in part, extinguished by another which at the time of action might be barred by the law of limitations, and to which, if pleaded as a set-off, the law of limitations might be replied.[1] The Courts in India would probably prefer the imperfect, but English, doctrine of set-off.[2] The defence of set-off seems to be a matter of procedure relating to the remedy and therefore governed by the *lex fori*.[3]

General rules as to set-off.

376. The general rule is that for compensation or set-off to operate, the debts must be completely due, and be between the same parties in their own right, and must be of the same kind or quality, and be clearly ascertained or liquidated. They must be certain and determinate debts. Set-off is confined to pecuniary demands, but compensation was allowed of one debt of grain, &c., by another debt of the like grain, if both were equally certain.[4] Where A owes B a debt payable at a future date, and B owes A one payable now, this constitutes, not a mutual debt, but a mutual credit; by English law the former debt cannot be used as a set-off except in bankruptcy, but a superior equity would permit it, discount being allowed for immediate payment.[5] No set-off of a sum certain can be pleaded, where the action is for unliquidated damages, and much more when it is for a tort; and, on the other hand, a demand which is itself unliquidated cannot be used

1 See 1 Pothier on Oblig. 408—424; 2 id. 112—116; Domat. B. 4, T. 2; 2 Story's Eq. Jur. 1430—1444.

2 See a dictum in 1 Madras H. C. R. 397.

3 Macfarlane *v.* Norris, 9 Jur. N. S. 74.

4 1 Pothier on Oblig. No. 588; 2 Story's Eq. Jur. 1441.

5 *Exp.* Prescott, 1 Atk. 230. The leading case on set-off in bankruptcy is Rose *v.* Hart, 2 Sm. L. C. 232.

as a set-off in an action for a sum certain.[1] But if a demand is in part liquidated and in part unliquidated, there may be a set-off as to so much as is liquidated.[2] A right subsequently accrued cannot be set-off against a judgment previously obtained, so as to stay its execution.[3] As against an assignee of a bond there can be no set-off by the debtor of a debt accrued due to him from the assignor subsequently to the notice of assignment, though resulting from a previous contract, unless there is evidence of a previous intention of the parties that the one debt should be set-off against the other.[4] An injury cannot be set-off against a debt, nor one injury against another;[5] but set-off can only arise out of some contract, express or implied, to pay and receive the money, either between the parties or those claiming through them.[6]

Exceptions and Examples.

377. A surety is an exception to the rule that the debts must be between the same parties, as he may not only oppose as a compensation or set-off what is due from the creditor to himself, but also what is due to the principal debtor.[7] One sued as a guardian, executor, or trustee cannot set-off a debt due to himself individually;[8] but where the defendant has a money demand against the plaintiff, but in the name of trustees, this is a good equitable set-off; so if A sues B on a bond, and in defence it is shown that the bond was given to A as trustee for C, then a debt

1 Hardcastle *v.* Netherwood, 5 B. and Ald. 93; Sapsford *v.* Fletcher, 4 T. R. 512.

2 Crampton *v.* Walker, 7 Jur. N. S. 43.

3 Maw *v.* Ulyatt, 7 Jur. N.S. 1300. As to setting off one decree against another decree in the course of execution, see C. Civ. Pro. s. 209.

4 Watson *v.* Md. Wales Ry. Co. L. R. 2 C. P. 593.

5 Freeman *v.* Hyett, 1 W. Bl. 394.

6 Smee *v.* Baines, 7 Jur. N.S. 902.

7 *Exp.* Hanson, 12 Ves. 346; 18 Ves. 252; Bechervaise *v.* Lewis, L. R. 7 C. P. 372.

8 Kinnerly *v.* Hosack, 2 Taunt. 173; Addison on C. 992.

from C to B may be set-off.[1] A joint and several debt, being the separate debt of both, may be set-off against a separate debt.[2] Generally, a joint debt cannot be set-off against a separate debt, or *vice versâ*;[3] and on this principle the damages to which joint contractors may be entitled for a breach of contract cannot be reduced by setting off the gain by one or more of them on the occasion of the breach;[4] but a surety, though in form a joint debtor, may set-off the separate debt due to his principal;[5] and a joint debt may, in equity, be set-off against a separate debt, where there is a clear series of transactions establishing that there was a joint credit given on account of the separate debt.[6] A debt from or to a surviving partner, may be set-off against that for which he sues, or is sued, on his own account.[7] In an action by an undisclosed principal, the buyer may set-off a debt due by the agent who was not known to be such;[8] and a *del credere* agent, being liable to his principal, may set-off the debt due to his principal.[9]

Actions on bills and notes.

378. The mercantile instruments which have always been held to carry interest, are bills of exchange and promissory notes.[10] Where the bill or note is expressly made payable with interest, it is payable from the date; if it is silent about interest, it is payable only from the time when it becomes due;[11] and then it is not part of the debt, but merely damages for its detention,

1 Cochrane *v.* Green, 7 Jur. N. S. 548.
2 Owen *v.* Wilkinson, 28 L. J. 3 C. P; Fletcher *v.* Dykes, 2 T. R. 32.
3 France *v.* White, 6 Bing. N. C. 33.
4 Jebson *v.* E. & W. T. Docks, L. R. 10 C. P. 300.
5 *Exp.* Hanson, supra.
6 Vulliamy *v.* Noble, 3 Meriv. 618.
7 Slipper *v.* Stidstone, 5 T. R. 493; French *v.* Andrade, 6 T. R. 582.
8 George *v.* Clagett, 7 T. R. 359; Fish *v.* Kempton, 7 C. B. 687; Turner *v.* Thomas, L. R. 6 C. P. 610.
9 Morris *v.* Cleasley, 1 M. & S. 576; Grove *v.* Dubois, 1 T. R. 112.
10 See ante, § 373.
11 Orr *v.* Churchill, 1 H. Bl. 227.

and the Court is not bound to give it, though negligence or default by the holder seem to be the only proper grounds for refusal.[1] Upon a bill or note payable on demand generally, not specifying interest, interest is given from the time of the demand proved.[2] A drawer or indorser is liable for interest from the same date as the acceptor would have been, but not necessarily at the same rate;[3] if a particular rate is expressed that, of course, applies to all; but if interest is not expressly reserved, or, though reserved, the rate is not fixed, then the proper rate is the rate of the particular place where each party to the bill undertakes that he himself will pay it; and as to a drawer or indorser the contract is, on default of the drawee, to pay the bill, not where the drawee should have paid, but with such interest, damages, and costs, as the law of the country where the bill was drawn or indorsed allows.[4] Interest does not run after tender;[5] but money paid into Court must cover the interest down to the date of payment into Court.[6] Where the bill is in form for a sum of money but payable in specific goods at certain prices, the general rule in America seems to be that the measure is the debt with interest; viewed otherwise as a contract for the goods, it would be the market value of the goods at the time for delivery.[7]

379. There are various defences to actions on bills and notes, which regard the legality, or the want, or the failure of the consideration, but these will not be noticed here, they

1 Cameron *v.* Smith, 2 B. & Ald. 308.

2 Blaney *v.* Hendricks, 2 W. Bl. 761.

3 Chitty on Bills, (10th ed.) 275; Byles on Bills, (7th ed.) 265; Story on Bills, 399, 400; Mayne on D. 119; contra is Walker *v.* Barnes, 5 Taunt. 240.

4 Allen *v.* Kemble, 6 Moore's P. C. 314.

5 Dent *v.* Dunn, 3 Camp. 296.

6 Kidd *v.* Walker, 2 B. & Ad. 705.

7 Sedg. on D. 268—70.

Re-exchange. concern the right to recover the whole or a part of the nominal amount of the bill or note. The drawer of a bill is liable to re-exchange, no matter how many the hands through which the bill has been returned, and on which the exchange charges have been accumulating.[1] And the same rule holds as to an indorser,[2] but, of course, not as to the acceptor.[3] A party to a bill, who has been sued upon it, cannot recover the costs of the suit, in an action against the party who is liable to him.[4] According to all the notions of lawyers, a cheque is a bill of exchange; it is payable on demand, and interest by way of damages may be given accordingly.[5] A banker having funds of his customer in hand, is bound to cash his cheques when duly presented; and for a refusal substantial damages, without proof of actual damage, may be given, especially when the customer is a trader, the measure being what is a reasonable compensation for the injury done to the plaintiff's credit.[6]

Cheques.

380. Where a surety has paid money which the principal debtor ought to have paid, he may recover interest as damages on the sum so paid, for he is entitled to all such damages, costs, and charges as reasonably and naturally result from his fulfilment of the obligation of the principal debtor;[7] but the costs of improperly defending an action against the principal creditor are not recoverable.[8] So, in an action by bail against their princi-

CONTRACT OF SURETYSHIP.

1 Mellish *v.* Simeon, 2 H. Bl. 378; on the rule in America, see Sedg. on D. 271—4.

2 Auriol *v.* Thomas, 2 T. R. 52.

3 Napier *v.* Schneider, 12 East, 420.

4 Bleaden *v.* Charles, 7 Bing. 246.

5 Eyre *v.* Waller, 6 Jur. N.S. 512.

6 Rolins *v.* Steward, 14 C. B. 595; see ante § 23.

7 Petre *v.* Duncombe, 20 L. J. 242 Q. B.

8 Knight *v.* Hughes, 3 C. & P. 467.

pal, the former may recover all expenses incurred in rendering up the latter ; but not the costs of an action against them unadvisedly defended.[1] In an action against a surety, interest should be given if it would be given against the principal debtor.[2] Where a surety is so for part only of a debt, and something has been recovered from the debtor, a proportionate deduction should be made from the sum for which the surety is liable.[3] Where A has become surety for the honest conduct of B, the plaintiff must strictly prove the amount of loss for which A has become liable, or the damages will be nominal only.[4] Where there is a bond to indemnify or save harmless, the measure is the loss sustained and secured against ; a general agreement to indemnify against all persons extends only to losses from the lawful acts of others, but when it is to save harmless against all acts of a particular person, it will include also unlawful acts.[5] One indemnified is not bound to resist if he has no defence, but may make the best compromise he can, and recover the loss.[6] Nice questions arise as to what liability is a ground for an action, but these concern the right to recover at all.

Life insurance.

381. A life insurance being a contract to pay a sum at the death of the insured, the measure is that exact sum with interest as damages.[7] But an insurance against injury from accident is only a contract of indemnity, and the measure is such an amount, not exceeding the sum insured, as will be a

—against accidents.

1 Fisher *v.* Fallowes, 5 Esp. 171 ; see also Sedg. on D. 367.

2 Ackerman *v.* Ehrensperger, 6 M. & W. 99.

3 Bardwell *v.* Lydall, 7 Bing. 489.

4 Norman *v.* King, 4 C. B. 884.

5 Nash *v.* Palmer, 5 M. & S. 375.

6 Newborough *v.* Schroder, 7 C. B. 342.

7 Dalby *v.* I. & L. Ass. Co. 2 Sm. L. C. 213 is the leading case on the subject.

compensation for the bodily suffering, and medical expenses, but without regard to the pursuit or profession of the plaintiff, or his loss of time or profits.[1] Fire insurance is similarly a contract of indemnity. The undertaking is to pay the amount of the actual loss or damage within the sum insured; and that sum does not operate as an agreed valuation of the subject-matter. The damage is the actual intrinsic value of the thing insured at the time of its destruction, and not the amount for which it might be replaced; and the value is without reference to collateral circumstances of the person insured, rendering the thing insured of more or less advantage or value to him.[2] Damage to, and reasonable charges in removing, and saving from fire, articles insured, are recoverable.[3] If property insured at less than its value, be partly destroyed, the insured is entitled to be paid his whole loss, if it do not exceed the amount insured.[4] If the contract be that the insurer is to be liable only to the extent of the sum insured, and, after payment for a partial loss, a total loss ensues, the insurer is liable only for the difference between the sum already paid and the sum insured.[5] Collateral loss, as damage to trade or business, is not to be included.[5] Bailees of goods having only a partial interest, may yet recover the whole value for which they have insured the goods.[6]

Fire insurance.

382. The subject of marine insurance is a very complicated one, and only the general rules as to the adjustment of damages on such policies

Marine insurance.

1 Theobald *v.* R. P. Ass. Co. 10 Exch. 45; Addison on C. 1067.

2 Mayne on D. 178; 3 Kent's Com., (9th ed.) 484; Sedg. on D. 284—6.

3 3 Kent's Com. 483.

4 Id. 483.

5 Wright *v.* Pole, 1 Ad. & E. 621.

6 Walters *v.* M. Fire Co. 5 E. & B. 870; London, &c. Ry. Co. *v.* Glyn, 28 L. J. 188 Q. B.

can be briefly stated. It is not within the design of this chapter to state what is a total, and what a partial loss.[1] In this, as indeed in every contract of indemnity, the policy may be a valued one, that is, one where the value of the subject is agreed on by way of liquidated damages; and then, on a total loss, that is the measure of damages.[2] Hence, if there are several valued policies and the action is on one in which the value is small, the plaintiff can recover only such sum as with the sums paid on the other policies make up the value in the policy sued upon.[3] Where the policy is open, the value of goods is their invoice price or prime cost on board, with the premium of commission and insurance, but not including such payments as port charges.[4]

Particular average.

On a partial loss (generally termed a particular average) of a ship, the measure is calculated upon the cost of repairs properly and prudently done, deducting, where the ship is an old one and so improved by substituting new for old materials, the improved value, which, by usage, is taken as one-third of the cost of repairs;[5] thus, in an open policy the insurer pays the same aliquot part of the sum he has agreed to insure as the cost of the repairs is of the ship's value at the commencement of the risk; in a valued policy he pays the same proportion of the valuation in the policy.[6] On a partial loss of goods under a valued policy, the rule is, as is the gross market value at the port of delivery of such goods when

1 The leading case on this subject is Roux *v.* Salvador Tudor's L. C. on Merc. Law, 126.

2 Lewis *v.* Rucker, is one of the leading cases on adjustment of average, Tudor's L. C. on Merc. Law, 174. See Joyce *v.* Kennard, L. R. 7 Q. B. 78, a case on goods in lighters.

3 Bruce *v.* Jones, 9 Jur. N. S. 628.

4 *per* Lord Ellenborough in Usher *v.* Noble, 12 East, 646; Mayne on D. 186.

5 Fenwick *v.* Robinson, 2 C. & P. 324.

6 2 Arnould on Insurance, (2nd ed.) 995.

sound, to the gross price actually fetched by the goods as damaged, so is the value in the policy to the amount, the difference between which and the value in the policy is the measure of damages.[1] If the policy is open, then for the value in the policy is to be substituted the prime cost of the goods on board with premium of commission and insurance.[2] On a partial loss of freight, the measure is the expenses incurred in preserving it.[3] Where there has been no loss, but a contribution to a general average, the insurer is liable, and the measure is the same percentage on the sum or value insured as has been paid on the value estimated for the purposes of contribution.[4]

General average.

383. General average is where there has been a voluntary sacrifice of part of the cargo, or of the ship partly or wholly, to secure the safety of the rest, or extraordinary expenditure incurred for the joint benefit of both ship and cargo;[5] and the loss is distributed amongst all, the owner of the goods or ship lost not recovering, of course, their total value, but their value less his share in the contribution for the general loss.[6] No contribution is due for sacrifices where nothing is eventually saved, but disbursements for the general benefit must be reimbursed in general average, whether the ship and cargo be eventually saved or not.[7] The value of the goods lost is their net market value at the port of adjustment, deducting therefrom freight, duty, and landing

Valuation of loss.

1 Smith's Merc. L. (5th ed.) 378; 2 Arn. on Ins. 984; Mayne on D. 188 seems scarcely accurate; Johnson *v.* Shedden, 2 East, 581; Tudor's L. C. on Merc. L. 181.

2 Arn. on Ins. 981, 985.

3 Moss *v.* Smith, 9 C. B. 103; Mayne on D. 188; 2 Arn. on Ins. 976—80. On the meaning of "freight," see Denoon *v.* H. & C. Assur. Co. L. R. 7 C. P. 348.

4 2 Arn. on Ins. 967.

5 Id. 895; a recent case on extraordinary expenditure is, Wilson *v.* Bk. of Victoria, L. R. 2 Q. B. 203.

6 2 Arn. on Ins. 937.

7 Id. 938—9.

charges, and, where the cargo saved has been damaged, allowing a further reduction as if the goods lost had arrived having suffered a similar degree of damage.[1] The value of goods sold is the same unless they actually fetched more.[2] For a partial loss to the ship, the measure is the cost of repairs deducting one-third new for old;[3] on a total loss, it is the value of the ship at the port of departure, less subsequent wear and tear, and adding the gross freight which she would have earned.[4] The loss of freight is the gross sum which would have been earned on the goods lost or sold. To money spent for general average purposes are to be added the interest, and cost of raising it, as discount, exchange, &c.[5] The value of the goods saved is, for the purposes of contribution, in case of sacrifices, their actual market price at the port of adjustment less freight, duty, and landing expenses; and in case of expenditures, their value at the time and place at which the expenditure was incurred.[6] The value of the ship for the like purpose is its selling price, that is, its value at the port of departure less wear and tear, and any partial loss, and the stores expended, but adding the amount to be paid to herself on account of general average loss.[7] The value of the freight for the same purpose is that thus saved and finally received, less wages due from the time of the loss, and port charges, &c., which would not have been paid if the vessel had been lost.[8] The insurer repays the same proportional part of the insured value as the contribution is of the contributory value.[9]

Contributory value.

1 2 Arn. on Ins. 946—7; Fletcher v. Alexander, L. R. 3 C. P. 375.
2 2 Arn. on Ins. 948.
3 Ibid.
4 Ibid; Mayne on D. 193.
5 2 Arn. on Ins. 949.
6 Id. 950, 957.
7 Id. 952—3.
8 Id. 956; Mayne on D. 195.
9 2 Arn. on Ins. 967—9; ante § 382.

384. The last action for a breach of contract to be noticed, is one that borders on a tort, and is sometimes so called, but is accurately a mere breach of contract; this is the action for breach of promise of marriage. Generally, the loss from non-performance of a contract may be stated in money; but the advantages to be gained by amarriage cannot, with equal accuracy, be represented by a sum of money; still the damages given ought to be as nearly an accurate compensation in a money form, as the subject-matter of the contract will admit of. There is a damage from the loss of positive advantages, and, therefore, the wealth and social position of the defendant are to be considered.[1] There is also to be compensation for the feelings of the person who has suffered; and, in regard especially to a woman's social position, this damage from the breach may be very material; but the damages are compensatory for the mental suffering of the plaintiff, and not, as in torts, exemplary to punish the motives of the defendant. If there has been seduction, that as affecting the social position of the plaintiff may be considered; and if, at the trial, the defendant has heaped imputations upon the plaintiff's character, it is a ground for aggravation of damages.[2] In mitigation of damages may be shown any facts likely to have diminished happiness, as the unsuitableness of the match.[3] In bar of the action, that is of the right to recover, there may be various defences, as immoral conduct, brutal and violent temper, or bodily infirmities, discovered or displayed after the contract was entered into; or misrepresentations as to family circumstances or previous life, which were material inducements to the contract.[4]

BREACH OF PROMISE OF MARRIAGE.

1 James v. Piddington, 6 C. & P. 390.
2 Berry v. DaCosta, L. R. 1 C. P. 331.
3 Mayne on D. 282; Sedg. on D. 423.
4 See Addison on C. 747; Roscoe's Ev. N. P. 323; Mayne on D. 283; Sedg. on D. 423.

385. Next as to the measure of damages for torts. For the reasons before given there is often no definite scale except the exercise of a temperate discretion; this is so especially in cases of personal injuries. Though, except where malice is of the essence of the tort, as a general rule, the motive of the defendant is immaterial in constituting the tort, yet, in assessing the damages for a tort, the malice or motive of the defendant may, generally, be properly considered as an aggravation or otherwise.[1] Actions for personal injuries are of a transitory nature, and may be brought in one country for such torts committed in another; thus, an action may be brought in England for an assault committed, or a libel published, in India.[2] But generally to found an action for a tort committed abroad, first the wrong must be of such character that it would have been actionable if committed here, and secondly the act must not have been justifiable by the law of the place where it was done.[3] In an action for assault and battery there is no possible scale for damages; each case will depend on its own facts. Some circumstances that go to inflame the damages have been stated in Section 38. The damages should be exemplary; and hence, in mitigation, it may be shown that the blow was unintentionally struck, and that an apology was immediately offered; or circumstances of provocation and excuse may be proved. Any prospective damage should always be included.

DAMAGES FOR TORTS.

Where torts may be sued for.

Assault and battery.

1 On the effect of payment of money into Court in an action for tort, see Taylor on Evid. s. 765.

2 Scott *v.* Lord Seymour, 8 Jur. N. S. 568; 9 Jur. N. S. 522; Hart *v.* Gumpach, L. R. 4 P. C. 464.

3 The Halley, L. R. 2 P. C. 203; Phillips *v.* Eyre, L. R. 6 Q. B. 28; The M. Moxham, 1 P. D. 107.

386. In an action for false imprisonment there is no certain measure; but every expense that the plaintiff in person or by his agent necessarily incurs in order to restore himself to a complete state of freedom from imprisonment, may be claimed and recovered as part of the damages; thus, if the plaintiff was released on bail, the expense of procuring the order for bail to be set aside, may be included.[1] The damages consequent upon a remand, which is the judicial act of the Magistrate, are not to be included; but it would be otherwise in an action for malicious arrest.[2] It will be a too remote damage that the plaintiff, by reason of his detention, missed the opportunity of being taken into a certain employment.[3] A recovery in an action for false imprisonment is no bar to an action for a malicious prosecution. They are altogether different causes of action. Hence, none of the circumstances connected with the subsequent prosecution can be proved, or allowed for in damages, in an action for false imprisonment.[4] A plea of probable cause is an apology in mitigation of damages, or, in some cases, a justification of the imprisonment; but an unsuccessful plea that the plaintiff was guilty of the offence is a persistence in the charge, and a ground for aggravation of damages.[5] If plaintiff has been compelled, by arrest under a void warrant, to pay more money than is due, he is entitled to recover back the whole, and not only the overpayment.[6]

False imprisonment.

387. In actions against judicial officers for false imprisonment or for a malicious conviction, some of the circumstances which may be considered in

Actions against judicial officers.

1 Foxall *v.* Barnett, 2 E. & B. 928.
2 Lock *v.* Ashton, 12 Q. B. 871.
3 Hoey *v.* Felton, 8 Jur. N. S. 746.
4 Guest *v.* Warren, 9 Exch. 379.
5 Warwick *v.* Foulkes, 12 M. & W. 507.
6 Clark *v.* Woods, 2 Exch. 395.

assessing the damages have been stated in Section 61. Where malice is an ingredient, the Court is especially bound to give exemplary damages. Where a judicial officer, though not acting maliciously, has yet so exceeded his jurisdiction as to be liable for false imprisonment, the damages ought to be only nominal, if it is proved that the plaintiff was actually guilty of the offence of which he was convicted, and that he had undergone no greater punishment than that assigned by law for the offence.[1]

Malicious arrest, or prosecution.

388. In actions for a malicious arrest, or for a malicious prosecution, the damages may be matter of calculation, as where they consist of the necessary charges to which a man has been put to procure his discharge, or in defending himself against the prosecution, or of the costs and expenses for his maintenance during his detention, or, where the process has been abused to compel the delivery of property, of the loss arising from the retention of the property.[2] Where two were charged, and one of them (the plaintiff) employed an attorney to defend them, he may recover the amount of the bill, if their defences were not severable.[3] The costs and expenses of procuring a discharge from an arrest are, it has been thought, limited to those which have been taxed, or recognised by the Court; and extra costs, though actually incurred, are not recoverable.[4] The measure is not so certain where the damages are for the loss to the plaintiff from his being prevented, by the arrest, from attending to his business, or

1 This is the principle of 11 & 12 Vict. c. 44, s. 13.

2 Foxall *v.* Barnett, 2 E. & B. 928; Churchill *v.* Siggers, 3 E. & B. 929.

3 Rowlands *v.* Samuel, 11 Q.B. 41.

4 Sinclair *v.* Eldred, 4 Taunt. 7; contra is Sandback *v.* Thomas, 1 Stark. 306; for other cases both ways, see Rosc. Evid. N. P. 554.

from the injury to his credit.[1] The damages are purely discretionary where they are for the loss of reputation from the imprisonment, or from the scandalous nature of the prosecution.[2]

389. In actions for libel and slander the damages are purely discretionary, and will depend upon the nature and character of the libel, the extent of its circulation, the position in life of the parties, and the surrounding circumstances of the case.[3] An innocent and virtuous woman charged with unchastity is entitled to liberal damages; a lewd and dissolute woman, it may be, to only slight or nominal damages, though the act of unchastity charged was false.[4] There being a cause of action, the damages need not be nominal, but may be substantial, though there is no evidence of actual damage.[5] Prospective damages for the loss that may afterwards flow from the libel should be included, as such future damage would not constitute a fresh cause of action.[6] Where the action is for general damages, as a falling off in trade from slander, the plaintiff may show a general damage to his trade, but he cannot, it seems, give evidence of particular instances.[7]

Libel and slander.

390. One matter in aggravation of the damages is the degree of malice on the part of the defendant. Though proof may be given of successive libels in order to show malice, care must be taken that the damages are not assessed in respect to such libels,

Matters for aggravation.

1 Jennings *v.* Florence, 26 L. J. 277 C. P.

2 Leith *v.* Pope, 2 W. Bl. 1326.

3 Addison on T. 729.

4 1 Hilliard on T. 472.

5 Tripp *v.* Thomas, 3 B. and C. 427.

6 Ingram *v.* Lawson, 8 Scott, 477; 6 Bing. N. C. 212.

7 Ibid.; Rose *v.* Groves, 5 M. and Gr. 618; 1 Hilliard, 974.

but only in regard to the one for which the action is brought.[1] An unsuccessful plea of justification is an aggravation, and even though such plea should, at the time of trial, be abandoned and apologized for.[2] But evidence of malice may be inadmissible from the form of the action; thus, the publisher of a review is not affected by the malice of the writer of an article in it, though responsible for the publication;[3] so also, in a joint action by partners for a libel, no damages can be given for the injury to their feelings, as the only basis of the joint action is the injury to their joint trade.[4]

—for mitigation.

391. In mitigation of damages anything may be shown to prove the absence of malice. It seems that the defendant may show that rumours and reports of the same tenor as the libel were current prior to its publication, (but not that they were current afterwards,[5]) this being not to justify the slander wholly or in part, but to rebut the charge of actual malice, on the same principle as evidence to prove it is admissible.[6] It seems no mitigation, and certainly is no justification, that the defendant, at the time, named a third person from whom he had heard the slander;[7] it has been decided but since doubted, that it would be a mitigation, that he had copied the statement

1 Pearson *v.* Lemaitre, 5 M. and Gr. 700; see 1 Hilliard, 355—8.

2 Warwick *v.* Foulkes, 12 M. and W. 508.

3 Robertson *v.* Wylde, 2 M. and Rob. 191.

4 Haythorn *v.* Lawson, 3 C. and P. 196; Cook *v.* Batchelor, 3 B. and P. 160.

5 Thompson *v.* Nye, 16 Q. B. 175.

6 There has been a conflict of decisions: see the cases collected in Rosc. Ev. N. P. 545; see also Mayne on D. 281; Addison on T. 731; 1 Hilliard, 453 (n.)

7 Bennett *v.* Bennett, 6 C. and P. 588, that it was a mitigation; but see McPherson *v.* Daniels, 10 B. and C. 263. See numerous cases collected in 1 Hilliard, 448—457.

from another newspaper :[1] yet from such facts, the absence of malice might sometimes be fairly inferred. He may show that he had reasonable ground to believe the libel, though the evidence does not amount to a justification of it as being true.[2] So, a report of a trial, though not a correct one, may, by way of mitigation, be shown to have been an honest one, and intended as a fair account.[3] Where the plaintiff sues for the injury to his general good character, evidence of his previous general bad character may be given.[4] So, provocation may be shown; if two men are concerned in publishing monstrous libels against each other every day, there can be no claim to damages on either side;[5] though one libel cannot be set off against another unconnected with it, it may be shown that the libel published by the plaintiff provoked the libel published by the defendant.[6] Evidence of offers of apology ought to go to reduce the damages.[7] It is immaterial that the plaintiff has already recovered damages from another person for a like libel, or that others have similarly libelled him, and he has omitted to sue them.[8] It is no mitigation that a third person, whose act is the special damage, would probably have acted in the same way, had the slander not been used.[9]

392. Lastly, the damage must not be too remote; it must be the legal and natural consequence of the defendant's own acts, and not the

What is too remote.

1 Saunders *v.* Mill, 6 Bing. 213, doubted in Talbutt *v.* Clark, 2 M. and Rob. 312.

2 Mayne on D. 280; Addison on T. 730.

3 Smith *v.* Scott, 2 C. and K. 580.

4 Leicester *v.* Walter, 2 Camp. 251; and see 1 Hilliard 463—6; Mayne on D. 274.

5 Finnerty *v.* Tipper, 2 Camp. 72.

6 Watts *v.* Fraser, 7 Ad. and E. 223.

7 It is so, by 6 & 7 Vict. c. 96, s. 1, in England.

8 Creevy *v.* Carr, 7 C. & P. 64; Reg. *v.* Newman, 1 E. & B. 268.

9 Knight *v.* Gibbs, 1 Ad. & E. 43.

mere wrongful act of a third person; as where slander has been improperly repeated.[1] It has been held, but seems questionable, that there is no duty of a wife to repeat to her husband slander regarding herself, and that the consequent act of the husband will be too remote a damage.[2] So, the illness of the wife consequent upon slander imputing adultery to her, has been held not to be a special damage; for that depends upon the peculiar temperament of the party injured.[3] So also, that the husband has separated from his wife in consequence is not a special damage. Mental pain alone without a material damage cannot be valued by the law.[4] If A slanders B to C, B is not entitled to recover damages for a general loss of business caused by repetition of the words, but only for the loss arising directly from their being so spoken to C.[5] If words are spoken in angry altercation, and without malice, nominal damages only without costs, may be given, if there was no real damage.[6]

393. In an action for slander of title, the special damage must be proved, and that will, in part, be the measure of damages: this damage may consist in the property having on a sale realized a less price than it otherwise would; or in the owner being put to other necessary expenses in consequence;[7] but another essential ingredient, which will also affect the measure of damages, is the presence of malice.[8] The want of probable cause does not necessarily lead to an inference of malice,

Slander of title.

1 Vicars *v.* Wilcocks, 2 Sm. L. C. 423.

2 Parkins *v.* Scott, 8 Jur. N. S. 593.

3 Allsop *v.* Allsop, 5 H. & N. 534; 6 Jur. N. S. 433; the rule in America seems to be otherwise, see 2 Hilliard, 507.

4 Lynch *v.* Knight, 9 H. L. C. 577; 8 Jur N. S. 724.

5 Dixon *v.* Smith, 5 H. & N. 450.

6 Wakelin *v.* Morris, 2 F. & F. 26.

7 Brook *v.* Rawl, 4 Exch. 524.

8 Malachy *v.* Sloper, 3 Scott, 737.

neither does the existence of probable cause afford any answer to the action.[1] In actions for the invasion of personal privileges, as rights of franchise, &c., the damages are discretionary, but they ought to be substantial, and, where malice is an ingredient, exemplary, though no actual damage may be shown. For every unresisted obstruction to the enjoyment of an incorporeal right would be evidence against the right, and, therefore, highly injurious to the party claiming it; and where a man has acted maliciously in infringing another's right, as the right to vote, he ought to be made to pay well for it.[2] Where to the exercise of the right is attached the receipt of fees or other emoluments, any diminution or loss, actual or prospective, of such may be shown by way of special damage, and for this purpose evidence may be given of the ordinary receipts.[3]

Invasion of personal privileges.

394. In actions for personal injuries from negligence, it is not possible to name a certain measure; loss of time, expenses of cure, pain and suffering, permanent disability for future exertion, and consequent pecuniary loss, are all grounds for the calculation of damages;[4] but the damages can seldom be what they ought to be, a compensation; scarcely any sum could compensate a labouring man for the loss of a limb, yet a Court does not, in such a case, give him enough to maintain him for life.[5] But, unlike the rule in actions on insurances against accidents, the plaintiff's profession and pros-

Personal injuries from negligence.

1 Pater v. Baker, 3 C. B. 868.

2 Ashby v. White, 1 Sm. L. C. 208—9.

3 So held in the case of the Cazee of Bombay before the Supreme Court in April 1861.

4 Mayne on D, 264.

5 Armsworth v. S. E. Ry. Co. 11 Jur. 758.

pects are to be considered, as they affect the measure of compensation to the plaintiff. It seems that the Court may take into consideration the motives of the defendants ; and if the negligence is accompanied with a contempt of the plaintiff's rights and convenience, exemplary damages may be given.[1] A sum received by the plaintiff under an insurance policy against accidents cannot be taken into account in reduction of damages.[2] Where the result of the negligence is death, the general rule is, that whatever the liability otherwise of the defendant, there can be no action by the representatives of the deceased, since the wrong is a purely personal one which dies with the person. It is only by express law that in England and also in India, certain relatives of the deceased may have an action for damages ;[3] but as under these enactments, the negligence and not the death is the cause of action, the acceptance by the deceased whilst alive of a sum as compensation will bar an action after his death.[4] In suits under these Acts the measure of damages excludes any compensation for the mental suffering of the relatives,[5] and should be a reasonable compensation for their pecuniary loss from the death,[6] this will not include funeral expenses,[7] but need not be calculated in the same strict manner as if the value of the life was a matter of bargain with an annuity office, but will include, not merely any legal right of the relation against the deceased,

1 Emblen *v.* Myers, 6 H. and N. 54 ; Bell *v.* Midland Ry. Co. 7 Jur. N. S. 1200.

2 Bradburn *v.* G. W. Ry. Co. L. R. 10 Exch. 1.

3 9 and 10 Vict. c. 93, and 27 and 28 Vict. c. 95 ; and in India Act 13 of 1855 ; it is the same in some States of America, 1 Hilliard, 97 ; 2 id. 389.

4 Read *v.* G. E. Ry. Co. L. R. 3 Q. B. 555.

5 Blake *v.* Midland Ry. Co. 18 Q. B. 93.

6 Armsworth *v.* S. E. Ry. Co. supra ; Rowley *v.* L. and N. W. Ry. Co. L. R. 8 Exch. 221.

7 Dalton *v.* S. E. Ry. Co. 27 L. J. 227 C. P.

but also any reasonable expectation of pecuniary benefit from the continuance of the life.[1] Hence the damages arising from the loss of pecuniary provision which would otherwise have been made by the deceased, or from the loss of education, and the comforts and conveniences of life, are not too remote.[2] But there must be some actual loss or damage.[3] The same principles apply where the personal injury is from the sale of noxious provisions, from deceit, or from a breach of duty by the bailor of a chattel.

DAMAGES FOR TORTS TO REALTY.

Adverse occupany.

395. Next as to damages in actions for torts to real property. The plaintiff in an action against an adverse occupant, must prove the value of the mesne profits; and if he gives no evidence as to the length of time the defendant was in possession, the damages will be nominal.[4] But the Court, in estimating damages, is not confined to the mere rent or annual value of the premises, but may give such extra damages as it thinks fit, as a compensation for plaintiff's trouble, &c.;[5] and hence any consequential damage may be given, as the loss from shutting up a shop, and so destroying the trade and good will.[6] So, where, after notice to quit, a tenant holds over, the landlord will recover any reasonable damages, and costs sustained by him in an action by another party, to whom he had contracted to let the premises, but to whom he could not in consequence give posses-

1 Franklin *v.* S. E. Ry. Co. 4 Jur. N. S. 564; Armsworth *v.* S. E. Ry. Co. supra.

2 Pym *v.* G. Northern Ry. Co. 8 Jur. N. S. 819; 10 Jur. N. S. 199. As to whether a child *en ventre sà mere* can claim, see L. R. 3 Adm. 480.

3 Duckworth *v.* Johnson, 4 H. and N. 653; 5 Jur. N. S. 630.

4 Ive *v.* Scott, 9 Dowl. P. C. 993.

5 Goodtitle *v.* Tombs, 3 Wils. 121; Doe d. Levy *v.* Roe, 6 C. B. 275; Sedg. on D. 134.

6 Dunn *v.* Large, 3 Dougl. 335.

sion;[1] or where the tenant had sublet, the costs of ejecting the undertenant even though he held over against the will of the tenant.[2] Payments for which the plaintiff, if in possession, would have been liable, as ground rent, &c., must be allowed for.[3] The Roman law distinguished as to a defendant who had been a *bonâ fide* possessor, and allowed him to retain the mesne profits up to the time when he had notice of the defect of his title;[4] but there seems no such distinction in our law, and a defendant would be liable, not only for the profits he has actually made, but for those which, by proper management, he might have made, and also for any loss from omitting necessary repairs.[5]

Improvements.

396. There is much difference of opinion as to whether the defendant ought to be allowed for permanent improvements made by him whilst in possession; some hold such outlays never to be recoverable; others limit their recovery to where there has been a fraud upon the defendant by the plaintiff in standing by, and acquiescing in his making improvements, without giving notice of his own title: then they are certainly to be allowed for; but others make the recovery depend, not upon any fraud of the plaintiff, but upon the good faith of the defendant. Perhaps the rule may be stated thus; permanent improvements ought to be allowed for, where they were made during a possession acquired and continued under a reasonable and honest belief of the absence of any defect of title, and without notice; and an innocent possessor will be

1 Bramley *v.* Chesterton, 27 L. J. 23 C. P.

2 Henderson *v.* Squire, L. R. 4 Q. B. 170.

3 Doe *v.* Hare, 2 C. and M. 145.

4 See Domat, B. 3, T. 5, S. 3, art. 5; there are many other authorities.

5 Hicks *v.* Sallitt, 3 DeG. M. & G. 801—17; Seton on Decrees (3rd ed.) 398, 467.

in no default, if he has exercised such diligence in inquiry, as reasonable and prudent men of business, applying their understandings to the circumstances of the case, would have exercised before investing their money in reliance on the title.[1] No distinction has been taken between permanent improvements that are useful, and those of a merely luxurious or ornamental character.[2] When allowed for, the amount is not limited as a set off to the sum claimed by the plaintiff as mesne profits.[3]

How the account is to be taken.

397. In such a case as where a minor, or cestui que trust, reclaims his estate which has been improperly bought by his guardian or trustee, the proper course is to take an account of the rents and profits of the estate received by the defendant, and of an adequate rent for such parts thereof as had been in his own occupation, and of all sums of money received by the defendant by the sale of timber, stone, or other parts of the inheritance, computing interest upon all such sums respectively, from the various times of their being received; and then to take another account of the sums actually paid by the defendant as the original price of the estate, and also of such further sums as the defendant

1 The above has been deduced from a consideration of the following authorities and cases; namely, 2 Kent's Com. 406—411; Mayne on D. 255; Sugden's V. and P. (13th ed.), 214, § 40; 237, § 28; 530, § 70; 571—2, 614, § 29, 30; Story's Eq. Jur. § 799, a, b, and note; § 1234—9; § 389, 655; Earl of Oxford's case, 2 L. C. in. Eq. 506, 518—20; Dormer *v.* Fortescue, 3 Atk. 134; York B. Co. *v.* Mackenzie, 8 Bro. P. C. 42; Douglass *v.* Culverwell, 8 Jur. N. S. 34; Ramsden *v.* Dyson, L. R. 1 H. L. 129; 2 Spence's Eq. Jur. 29 (n) 304, 803; Sandar's Inst. Just. 195; Domat, B. 2, T. 7, s. 3, art. 3, 4, s. 4; B. 3, T. 1, s. 5; B. 3, T. 5, s. 3, art. 5, 6, 9—13; T. 7, s. 3; B. 1, T. 2, s. 10, art. 16; Gaius IV, 117, 119; Bowyer's C. L. 90, 92, 93; Cumin's C. L. 71; Norton's Topics Jur. 283; Seton on Decrees (3d ed.), 642, 646; Sedg. on D. 131, 136.

2 York B. Co. *v.* Mackenzie, supra.

3 2 Story's Eq. Jur. note to 799, b.

actually laid out for the permanent benefit and improvement of the estate, computing interest upon the said several sums from the times when the same were actually disbursed. One account is then to be set off against the other, and the balance paid as found due, the estate being reconveyed to the plaintiff.[1] If the estate has been resold by the trustee, the measure would be the profits made by him whilst in possession, and any increase of price on the resale.[2] Where improvements are to be allowed for to a *bonâ fide* possessor ejected under an adverse title, the equitable course would seem to be to calculate the mesne profits as if the estate had been left unimproved; and then, in order to fix the allowance for improvements, to take the sums actually laid out, computing interest thereon from the times they were disbursed, and to set off against them the enhanced mesne profits received with interest thereon from the dates of receipt, and the difference, if any, will be the sum alone payable by the plaintiff; for equity will be satisfied if the defendant is simply no loser. So, though the defendant is not allowed for improvements made by him, it would seem to be equitable to limit the plaintiff to the unimproved and not the enhanced mesne profits, but always, of course giving him all sums received by the defendant by the sale of parts of the inheritance, with interest thereon.

Trespass to land.

398. In actions for trespass to land, where actual damage has been done, the measure is the diminished value of the property, and not the sum which it would take to restore it to its former state;[3] if a house has been pulled down, it is the value of the old one,

1 See the decree in York B. Co. *v.* Mackenzie, 8 Bro. P. C. 70, 71.

2 Sugden's V. & P. 572, § 30.

3 Jones *v.* Gooday, 8 M. & W. 146.

not the cost of a new one.[1] Special consequential loss may be added; as loss from theft where defendant had committed trespass by entering and leaving open a window, and thieves entered by the same way;[2] or where the trespass is by diseased cattle, and plaintiff's cattle are infected.[3] So, the injury may consist of several acts, each of which would be by itself a trespass, and then each is to be considered in assessing damages.[4] But in such a case as trespass for breaking into a house on a false charge of being a receiver of stolen property, the charge is matter of aggravation, and not of distinct special damages.[5] Where the trespass is a single act of destruction, prospective damages should be given;[6] but a mere continuing trespass is a fresh cause of action every day, and subject to the rule stated in Section 354. Where the trespass is such an act as quarrying and carrying away stone, the measure is the price of the stone at the quarry without allowing for the cost of cutting it, and adding compensation for the damage to the soil by digging, and for the trespass in carrying away;[7] unless there is a *bonâ fide* disputed title, when the measure is the sale price of the right to have cut the stone.[8] Hence in the absence of fraud where coal is taken from an adjoining mine, the measure is the market value of the coal at the pit's mouth, less the actual disbursements; so that the owner shall neither be better nor worse off than if he had himself raised the coal.[9]

1 Hosking *v.* Phillips, 3 Exch. 168.

2 Ancaster *v.* Milling, 2 D. & R. 714.

3 Anderson *v.* Buckton, 1 Str. 192.

4 Mayne on D. 241.

5 Bracegirdle *v.* Oxford, 2 M. & S. 77.

6 Clegg *v.* Dearden, 12 Q. B. 576.

7 Wild *v.* Holt, 9 M. & W. 672; Morgan *v.* Powell, 3 Q. B. 278.

8 Wood *v.* Morewood, 3 Q. B. 440 (n.); Hilton *v.* Woods, L. R. 4 Eq. 432; Llynvi Co. *v.* Brogden, L. R. 11 Eq. 188.

9 *In re* U. Merthyr C. Co. L. R. 15 Eq. 46.

Damages how apportioned.

399. A tenant or reversioner cannot recover more than the amount of their respective interests; where trees have been cut down by a stranger, the interest of the tenant is in respect to the shade, shelter, and fruit, but the reversioner will recover the value of the timber itself.[1] Hence, satisfaction made to one is not a bar to an action by the other;[2] but it is otherwise as to a recovery from a co-trespasser, for recovery from one is a bar to an action against the other, since each co-trespasser is liable for the whole of the damage done;[3] but then the malicious motive of other co-trespassers is not to be considered.[4] Otherwise, acts of insult and malice are always, even where there is no actual damage done, matters of aggravation, for which exemplary damages should be given.[5] Especially for any invasion of the peaceable possession of dwelling houses, should exemplary damages be given.[6] Where an obstruction of a right of way, or other act, is a permanent injury to real property, the plaintiff may recover, as well for the damage done to the part of the premises which he occupied himself, as in respect of the damage done by his tenants being driven from their holdings.[7] And where the wrongful act was wilful and done with a high hand, for the purpose of gain to the defendant, or of ruining the plaintiff, or where it arose from wilful negligence accompanied with a contempt of the plaintiff's rights and convenience, exemplary damages may be given.[8]

Matters for aggravation.

1 Bedingfield *v.* Onslow, 3 Lev. 209.

2 Attersoll *v.* Stevens, 1 Taunt. 194.

3 Hume *v.* Oldacre, 1 Stark. 352; ante § 176 and 259.

4 Clark *v.* Newsam, 1 Exch. 131.

5 Merest *v.* Harvey, 5 Taunt. 442.

6 Rogers *v.* Spence, 13 M. & W. 581.

7 Bell *v.* Midland Ry. Co. 7 Jur. N. S. 1200.

8 Ibid.

400. In actions for nuisances to real property, where the nuisance is a continuing one, substantial damages may be given in the first instance; but generally nominal damages are given in the first action, and if a fresh action is brought for continuing it, then exemplary damages may be given to compel an abatement;[1] but damages cannot be given in respect of any injury subsequent to the day of the commencement of the action, for that is a fresh cause of action.[2] Where the nuisance is not a continuing one, the measure is the diminution in the saleable value of the plaintiff's interest, whether as tenant or reversioner, in the premises, in consequence of the nuisance.[3] Some special damage must always be shown, and in a continuing nuisance, the diminution in the saleable value of the property with the nuisance, though it can never be the measure of the damages, may be evidence of the extent of the nuisance; thus, the damage may be capable of calculation, as where a particular crop has been wholly or partially destroyed by a continuing nuisance; but where the effect is to make a house uncomfortable, or uninhabitable, the damage is not the less actual, though less easily estimated, and the diminution in value of the house with such a nuisance may well be looked to, not as the measure of damages to be given, but to estimate the extent of the damage up to the date of action.[4]

Nuisances.

401. Much the same principle governs the award of damages in some other torts to real property. At least nominal damages must be given for

Easements, &c.

1 Battishell *v.* Reid, 18 C. B. 696.

2 Fetter *v* Beal, 1 Salk. 11; Mayne on D. 33, 35, 36; 1 Hilliard, 656.

3 Tucker *v.* Newman, 11 Ad. & E. 41.

4 Soltau *v.* DeHeld, 2 Sim. N. S. 158.

every act amounting to an obstruction in law to the right to water, or to the enjoyment of an easement, or of a right of common, whenever the wrongful act, if undisturbed, would lay the foundation of a right; thus, for the wrongful defilement of a stream, or the interruption of a right of way, or of common, no special damage need be shown.[1] Where the wrongful act is continued, and a second action is brought, exemplary damages should be given to compel its abatement.[2] Special damage necessarily flowing from the act, as a loss of crops, may be shown and recovered and in assessing general damages regard must be had as to whether the damage is from a continuing or a single act; and the damages must be apportioned to the interest of the plaintiff. In case of an invasion of the right of support, or an injury from negligent user of real property, the right of action only arises on the occurrence of the special damage which must, therefore, be always proved.[3] Where a house has thus been destroyed or damaged, the amount must not be the cost of a new house or of repairs, but allowance must be made for the benefit of a new house, or the substitution of new for old materials; perhaps one-third new for old would be here a convenient rule.[4] In such a case, a tenant is entitled to recover in respect of the value of his possessory interest and unexpired term in the premises, and the landlord in respect of the injury to his reversion.[5] If the tenant is bound to keep the house in repair, so that he has to rebuild it, the loss accrues to him, and he is entitled to all the damages.[6]

1 Mayne on D. 256; Addison on T. 129.

2 Battishell *v.* Reid, 18 C. B. 696.

3 Bonomi *v.* Backhouse, E. B. and E. 622.

4 Lukin *v.* Godsall, 2 Peake, 15.

5 Panton *v.* Isham, 3 Lev. 359.

6 Lukin *v.* Godsall, supra.

He may also have damages for his loss in having to seek out and pay for another residence in the meanwhile.[1]

Where property has been insured.

402. It is a general principle applicable to the above and other cases of torts to property, that a defendant is not allowed to show, in reduction of damages, that the plaintiff has recovered the whole or any part of his loss under a policy of insurance; in such case, the plaintiff sues in the character of a trustee for the insurer, and is bound to hand over to the insurer, whatever money he receives from the wrongdoer, over and above the actual loss he has sustained, after taking into account the amount he has received under the contract of insurance. And an insurer, who has paid the loss, is entitled to sue in the name of the insured for the purpose of recovering full compensation from the wrongdoer.[2]

Waste.

403. In actions for waste, the actual damage must be proved, and the measure of damages will be similar to that on breach of a covenant to repair, or for the actual damage done on a trespass. Where the waste is by severing and appropriating parts of the inheritance, the measure will be the price of such parts as chattels without allowing for the cost of severance.[3] Where fixtures have been unlawfully detached and sold, the measure is the value of the fixtures as between an outgoing and incoming tenant, in addition to compensation for any intentional wrong, injury, or insult involved in the act of removal, or for any trespass that may have been committed in removing them.[4] Where the tenant is liable, on account

1 Hosking *v.* Phillips, 3 Exch. 168.

2 Yates *v.* Whyte, 4 Bing. N. C. 272; Clark *v.* Blything, 2 C. and B. 254.

3 Wild *v.* Holt, 9 M. and W. 672; Mayne on D. 208; ante § 398.

4 Thompson *v.* Pettit, 10 Q. B. 103.

of negligence or otherwise, to rebuild a house which has been burnt down, the measure of damages is not the cost of rebuilding the house, but the actual deterioration in the landlord's property; hence, the increased value of the new house, when or if built, is to be deducted from the cost of rebuilding.[1]

Negligence, &c.

404. In actions for want of skill or negligence in performing a contract relating to real property, the measure of the principal item of damage would seem to be the same as the measure of the reduction of the price in actions for chattels sold; that is, the sum required so to alter the property, or place it in such a condition, as that it may be in conformity with the contract, if it had been duly performed.[2] To this may be added any special damage sustained, being the natural and probable result of the wrongful act; as, for instance, in the case of a roof falling in from a negligently defective construction, a damage to such ordinary furniture, as it must have been within the contemplation of the parties would be kept in the house.[3] This is stating the measure as if it was an action for a breach of contract; but in such a case, the cause of action may generally be viewed, either as a breach of contract (but distinguishable, at the same time from a pure breach of contract), or as a tort, though sometimes there may exist those essentials which give to a third person, without privity of contract, a cause of action as for a tort.[4] Even in this latter case, it would seem unjust to extend the damages beyond what would be allowed to a party to the contract suing on it.

1 Yates *v.* Dunter, 11 Exch. 15.
2 Ante § 365.
3 Ante § 227.
4 Ante § 24—28, 152.

DAMAGES FOR TORTS TO PERSONALTY.

Trade marks.

405. Next as to the damages in actions for torts to personal property. Where there has been an invasion of the use of plaintiff's trade mark, he is, at least, entitled to some, though perhaps only to nominal damages, even where he has been unable to prove any particular amount of loss. The damages may not be altogether capable of calculation, as the measure may be the loss of sales to the plaintiff, and the injury done to the reputation of his business or merchandise.[1] It is not necessary to entitle the plaintiff to damages for past sales, that the defendant should have intended to deceive, or have known he was using the plaintiff's mark; for an injunction will be granted where the similarity is such as in fact misleads the public, though the defendant did not know of it or intend to do so;[2] the tort consists of the misuse, and the injury to property, and the loss to the plaintiff is the same whatever the defendant's knowledge or intention. Accordingly an account of profits will, in equity, be generally taken where an injunction is granted,[3] unless some cause, as great delay on the part of the plaintiff, justifies the refusal of an account.[4] The plaintiff must show a distinct damage; an account may be taken of the sales made by the defendant, but the plaintiff's loss of profits will not necessarily be the same.[5] The loss of business reputation is an item not capable of precise calculation. The wrongful gain to the defendant, and consequent loss to the plaintiff, is generally a matter within the knowledge of the defendant

1 2 Kent's Com. 472 (n); Sedg. on D. 675 (n).

2 Millington *v.* Fox, 3 My. Cr. 338.

3 Cartier *v.* Carlile, 8 Jur. N. S. 183; 31 Beav. 292; Edelston *v.* Edelston, 9 Jur. N. S. 479.

4 Harrison *v.* Taylor, 11 Jur. N. S. 408.

5 Leather C. Co. *v.* Hirschfield, L. R. 1 Eq. 299; Davenport *v.* Rylands, id. 308.

alone; and hence, if the plaintiff be able to prove any general loss of custom, it may be right to consider also the demand for such goods, and the length of time during which defendant has misused the mark, and to give substantial, or where there has been a fraudulent misuse, exemplary damages.

406. In actions for the invasion of copyright and patent rights, the damages are, to some extent, matter of calculation by taking an account, in one case of the sale of pirated copies and in the other of the profits which have arisen from the use of the invention, from the person who has pirated the same. But the damages need not be limited to such an account, for the sale of copies by the defendant is not only, in each instance, taking from the author the profit upon the individual book which he might otherwise have sold; but it may also be injuring him to an incalculable extent, in regard to the value and disposition of his copyright, which no inquiry for the purposes of damages could fully ascertain.[1] Generally a patentee will be limited as to damages to the royalty ordinarily charged by him to those licensed to use his machines, and will not in addition have a manufacturing profit.[2] The wrongful publication of private letters, manuscripts, &c. being an invasion of the right of property, at least nominal damages may be always given; where there is shown to have been wrongful loss to the plaintiff, or gain to the defendant, the damages may be substantial; and where the publication was from motives of malice or insult, the damages ought to be exemplary.[3] The right of action for the fraudulent misuse of another's

Copyright, &c.

1 2 Story's Eq. Jur. 932.
2 Penn *v.* Jack, L. R. 5 Eq. 81.
3 See ante § 236.

name being founded on pecuniary loss to the plaintiff, some such must be shown, and the measure will be such loss; wrongful gain by the defendant will not, in this case, be necessarily an equivalent, or any, loss to the plaintiff. Where the misuse seriously injures the plaintiff's reputation, it may be a libel, and actionable accordingly.[1]

Procuring breach of contract.

407. If a servant or contractor is induced not to perform the work or contract which he has undertaken to perform, through the malicious persuasion of the defendant, damages far beyond the value of the subject-matter of the contract may be recoverable from the wrongdoer.[2] They may include, not only the loss of services, but all damage resulting from the wrongful act.[3] In the absence of malice, they should be limited to actual money loss.[4] It will be a bar to the action, if the plaintiff has recovered, from the other party to the contract, a penalty agreed on for a breach of it.[5] Where an action for seduction lies, the damages are always exemplary, without the slightest regard to the actual value of the services lost during the consequent pregnancy and illness, the supposed sole foundation of the action.[6] The means of the defendant ought not to be enquired into, or to affect the amount of damages.[7] It is an aggravation that the seduction was effected under the guise of honourable addresses, but that there was also a breach of promise of marriage must not be taken into account in assessing the damages, as that is a separate cause of action.[8] It is a

Seduction.

1 See ante § 237; Clark *v.* Freeman, 11 Beav. 112.
2 Lumley *v.* Gye, 2 E. and B. 216, 230.
3 Gunter *v.* Astor, 4 Moore, 12.
4 Mayne on D. 285.
5 Bird *v.* Randall, 3 Burr. 1345.
6 Bedford *v.* M'Kowl, 3 Esp. 120.
7 Hodsoll *v.* Taylor, L. R. 9 Q. B. 82.
8 Dodd *v.* Norris, 3 Camp. 519; Tullidge *v.* Wade, 3 Wils. 18.

mitigation that the woman seduced was a person of loose, immodest, or immoral character,[1] or that the plaintiff was grossly negligent in exposing her to the defendant.[2] In actions for adultery also, the damages are always exemplary, and the amount is affected by a consideration for the state of affection, or otherwise, in which the husband and wife previously lived; by the fact of their being separated at the time; by the negligence of the husband in exposing his wife to the defendant; by his ill-treatment of his wife, or his general immoral conduct; by the previous immoral character or otherwise of the wife; or by the conduct of the defendant, as having been a gross breach of hospitality or friendship, or, on the contrary, his having supposed the wife to be single, or his being misled or solicited by her into the crime.[3] Where the action is not for the adultery, but for some special consequent loss, the damages will be strictly limited to such.

Adultery.

408. In an action for trespass to goods, there is one item in the damages that is peculiar to it; and that is the damages for the manner of taking; the other two items are common also to actions for conversion and detention, namely, the value of the thing taken, converted, or detained, and any special loss incurred therefrom. The damages for the manner of taking are not capable of calculation; malice, and insult, may be considered; and also the fact that the taking was under a false pretence of a legal claim. If the goods are not taken, but only injured, the damages in respect to the value

Trespass, conversion and detention.

1 Dodd v. Norris, supra.

2 Reddie v. Scoolt, 1 Peake, 240.

3 Mayne on D. 286—9; Addison on T. 800—1; Rosc. Ev. N. P. 563; 1 Selw. N. P. 23—25.

are the amount of deterioration. Where there has been a taking, the value will not always be the same in an action for trespass and for conversion; thus, in trespass for fixtures, their value as such, that is, between incoming and outgoing tenant, is the measure, but in conversion, only their value as chattels, that is, when severed.[1] In our Courts in India, though the difference as to the forms of action is not known, this distinction may be of value, where the first taking was not, in fact, tortious, but only the subsequent conversion of the goods by the defendant. But neither in an action for trespass nor for conversion, can the defendant be allowed to reduce the damages by deducting the cost of severance, or the increased value given to the goods by reason of the severance.[2] On the other hand, an improved value given to the goods subsequently to the act of trespass or conversion being complete, cannot be added to the damages;[3] and where the tort consists in a confusion of property, the item of value is the value of plaintiff's goods separately, excluding the value of the goods mixed with them.[4]

Where goods are not returned.

409. Generally, where goods have not been returned, it seems the better opinion that the value of the goods is to be taken, in actions for trespass or conversion, at their market price, if any, or otherwise their actual value to the owner,[5] at the time of being taken or converted;[6] and in an action for detention, the

1 Thompson *v.* Pettit, 10 Q. B. 103; ante § 403; Clarke *v.* Holford, 2 C. & P. 540.

2 Wild *v.* Holt, 9 M. & W. 672; Martin *v.* Porter, 5 M. & W. 351; *Semble* this is not the general rule in America. See Sedg. on D. 624 (n).

3 Reid *v.* Fairbanks, 13 C. B. 692, 729.

4 Mayne on D. 208.

5 France *v.* Gaudet, L. R. 6 Q. B. 204.

6 Greening *v.* Wilkinson, 1 C. & P. 625; 2 Selw. N. P. 1378; Mayne on D. 204—5; Sedg. on D. 550, 571—3.

value may be assessed at the price they bore in the market at the time of demand by the plaintiff, or at the time of trial, whichever is highest.[1] If the value is doubtful, and the defendant got or retains possession forcibly or fraudulently, and will not produce the article, the presumption is that it is of the highest value of an article of that kind;[2] and where it is shown that the defendant has come dishonestly by part of the property, it may be presumed that he got possession of the whole.[3] Otherwise, where the first taking was lawful, and the plaintiff has, or ought to have, the means of showing the value of the goods, as where the delivery was under a contract;[4] or, in any case, where the value is a matter peculiarly within the knowledge of the plaintiff, as where he sues for the detention of letters, documents, or title deeds, the plaintiff must prove the value, or the damages will be nominal only.[5] The sum for which the defendant sold the goods is not always their market value; it may be less, but if more, he cannot profit by his own wrong and retain the excess.[6] If the plaintiff was under an obligation to have sold, and the defendant fairly sold the goods as the plaintiff would have had to sell them, the selling price may be taken as their real value.[7] It is, however, entirely a question for the Court what damages it will allow; a Court need not have much compassion for trespassers, and is not bound to be curiously exact.[8] If the goods have, after the

Where goods are returned.

1 Archer *v.* Williams, 2 C. & K. 27; 5 C. B. 318.

2 Armory *v.* Delamirie, 1 Sm. L. C. 256.

3 Mortimer *v.* Cradock, 12 L. J. 166, C. P.

4 Cook *v.* Hartle, 8 C. & P. 568.

5 Davis *v.* L. and N. W. Ry. Co. 7 W. R. 105; Crossfield *v.* Such, 8 Exch. 159.

6 Glasspoole *v.* Young, 9 B. and C. 696.

7 Whitmore *v.* Black, 13 M. and W. 50.

8 Lockley *v.* Pye, 8 M. and W. 135.

trespass, conversion, or detention, been returned, but have fallen in price, the difference in their price at the time of the tort or of the demand by the plaintiff, and at the time of the return, may be given as a special damage consequent upon the tort.[1]

410. Where the property is a bill or valuable security, the value is its nominal amount, or its value in the hands of the plaintiff, if he had not lost possession of it;[2] to this interest is always to be added as a special damage, since that is an advantage of which the plaintiff has been necessarily deprived by the wrongful act of the defendant.[3] If the security was void at the time of the tort, and not by the act of the defendant, only nominal damages can be given as its value;[4] otherwise, if rendered worthless by the act of the defendant, its value in the hands of the plaintiff must be given.[5] In actions for title deeds, the measure will be the full value of the estate to which they belong, subject to reduction to nominal damages on their being given up.[6] Any special damage, the natural and immediate consequence of the defendant's act may be shown and allowed for; as, the loss in trade or credit from an unlawful seizure,[7] or costs properly paid by the plaintiff to a third party to recover possession of the goods.[8] Where a ship or other chattel in course of profitable use, or an essential part of machinery in use, is wrongfully seized or detained, the loss of profits from non-user is

Bills, &c.

Title deeds.

Special damage.

1 Williams *v.* Archer, 5 C. B. 318.
2 Delegal *v.* Naylor, Bing. 460.
3 Mayne on D. 212.
4 Wills *v.* Wells, 2 Taunt. 267.
5 M'Leod *v.* M'Ghie, 2 Scott, N. R. 604.
6 Loosemore *v.* Radford, 9 M. and W. 657; Sedg. on D. 565 (n).
7 Brewer *v.* Dew, 11 M. and W. 625.
8 Keene *v.* Dilk, 4 Exch. 388.

to be allowed for.[1] Where a mortgagee with a power of immediate sale is restrained by an injunction improperly obtained, he is entitled to every expense, with interest thereon, in keeping the chattel, and to have the chattel placed in the exact condition in which it was on the issue of the injunction.[2] In mitigation of damages may be shown the return of the goods; or that the interest of the plaintiff is nominal only, as where the transfer to the plaintiff was merely to defeat the creditors of the real owner;[3] a bailee is entitled to recover against a stranger the full value, but against the owner only in proportion to his own special interest.[4] So, if the defendant, though not the owner, has an interest in the goods, the measure is not the mere value of the goods, but the value of the plaintiff's interest in them at the time of the seizure.[5] And, though where the plaintiff relies, not on the fact of possession, but only on his right to it, the defendant may rebut the plaintiff's title by showing a title in a third person;[6] yet, against one in possession, a wrongdoer may not, even in mitigation of damages, set up the title of a third person, or show that some other than himself has a joint interest in the goods;[7] but he may reduce the damages by showing that the plaintiff is entitled only to a share, where he might have used the non-joinder of the co-sharer as a plea in abatement of the action.[8] The cost of keeping the chattel cannot be shown in reduction of damages.[9] Nor

Mitigation of damages.

1 DeMattos v. Gibson, 7 Jur. N. S. 282.

2 Ibid.

3 Cameron v. Wynch, 2 C. & K. 264.

4 Story on Bailm. 352.

5 Brierly v. Kendall, 17 Q. B. 93; Toms v. Wilson, 10 Jur. N. S. 201; see Johnson v. Stear, 10 Jur. N. S. 99.

6 Gadsden v. Barrow, 9 Exch. 514; Bullen & Leake's Prec. Pl. 428.

7 Jeffries v. G. W. Ry. Co. 5 E. & B. 802; Finch v. Blount, 7 C. & P. 478.

8 Sedgworth v. Overend, 7 T. R. 279; Bullen & Leake's Prec. Pl. 420.

9 Wormer v. Biggs, 2 C. and K. 31.

can a vendor set off the unpaid price of goods sold to the plaintiff, but the plaintiff is entitled to recover their full value, and the defendant must sue for the debt;[1] and conversely, it seems that in an action for the price the buyer cannot plead in defence that the seller after delivery wrongfully took possession of the goods, or that he resold them before delivery, the buyer being in default then.[2]

Trespass, &c. by officers of a Court.

411. In actions for trespass or conversion against officers of a Court, exemplary damages should be given where there has been violent, illegal, or malicious conduct on the part of officers entrusted with the execution of legal process; but officers acting *bonâ fide* are entitled to protection, and damages should be limited to the actual loss.[3] In trespass for taking goods under process in a place out of the jurisdiction of the Court, the plaintiff is entitled to the full value of the goods, and not merely to the damage sustained by reason of the taking in a wrong place.[4] If the value of the property illegally detained has fallen in the meanwhile, that is a special damage for which the officer is liable.[5] Where the plaintiff's goods have been seized under a writ against A, and are then distrained for rent or taxes due by A, the sum paid by plaintiff to procure their release, is a special damage.[6] So a sum paid to prevent an illegal execution upon plaintiff's goods may be recovered.[7] It seems that an officer is not allowed to set off sums paid by him for rent, &c. whilst he was in possession of plaintiff's goods.[8]

1 Gillard *v.* Brittan, 8 M. & W. 575.
2 Page *v.* Cowasjee, L. R. 1 P. C. 128.
3 Gregory *v.* Slowman, 1 E. & B. 360, 369; 5 E. & B. 571.
4 Sowell *v.* Champion, 6 Ad. & E. 407.
5 Barrow *v.* Arnaud, 8 Q. B. 609.
6 Keene *v.* Dilke, 4 Exch. 388.
7 Valpy *v.* Manley, 1 C. B. 594.
8 White *v.* Binstead, 13 C. B. 308; Goldsmid *v.* Raphael, 3 Scott, 385.

412. In an action for a wrongful distress damage feasant, the measure will be similar to that in actions for trespass to goods, that is, the items to be considered are, the manner of and motive for the taking, the value of the thing taken, and any consequential loss upon the taking. In actions for wrongful distress for rent, the special enactments often provide for damages.[1] Otherwise, whenever the landlord has distrained without any right or authority to distrain, there is a trespass upon, and injury to the realty, independently of the trespass in regard of the seizure of the chattels, and the tenant is entitled to recover substantial damages for the disturbance of his peaceable possession, as well as for the unlawful seizure of his goods.[2] Where a landlord distraining acts so as to render himself a trespasser from the beginning, the measure is the full value of the property seized and the fact of the rent having been discharged is not to be considered.[3] Where the landlord takes things, some of which are not distrainable, the damage is limited to such only, and the tenant may recover the full value of them.[4] To make a distress excessive, it must be altogether out of proportion;[5] and to determine whether a distress was excessive, it must be ascertained what the goods seized would have sold for at a broker's sale, and not their value to an incoming tenant.[6] Where the distress is excessive, but the tenant is not ultimately deprived of the things, the measure is a compensation for the consequent additional expense, and for the

Wrongful distress.

1 See for instance Madras Act 8 of 1865, ss. 17, 36, 49 & 78.

2 Addison on T. 479.

3 Attack *v.* Bramwell, 9 Jur. N. S. 892; see ante § 165.

4 Harvey *v.* Pocock, 11 M. & W. 740; Keen *v.* Priest, 4 H. & N. 236; 28 L. J. 157 Exch.

5 Piggot *v.* Birtles, 1 M. & W. 441; Roden *v.* Eyton, 6 C. B. 430.

6 Wells *v.* Moody, 7 C. & P. 59.

inconvenience, and the loss of the absolute ownership and power of disposition for the time; otherwise, it would seem, the measure is the real value of the goods sold in excess.[1] Where the tenant has only a right to the use of the goods distrained, that is a sufficient special property to entitle him to sue, and the measure of damages is the sum he was obliged to pay in excess of the rent *plus* any damage from being deprived of the use of the goods.[2]

Actions against bailees.

413. In actions against bailees, where the injury consists in the wrongful loss, deterioration, detention, or refusal to re-deliver the chattel bailed, the measure of damages will be the same as in actions for conversion or detention, since the possession is always, in its inception, lawful.[3] Where goods are deposited with a warehouseman, and are lost by negligence, as a case of patterns, the damages are limited, in the absence of special contract, to the actual value.[4] In an action against the pawnee for selling the pledge before the time fixed, the interest of the pawnee in the pledge ought to be taken into account, and the measure is the loss to the pawner, and not the full value of the pledge.[5] Where an action will lie for nonfeasance, then, as to most bailees, the obligation is consequent upon the contract, and it is, in truth, a case of breach of contract; and the measure of damages will be the necessary and legal consequences which must be taken to have been in the contemplation of both parties. But in the case of such bailees as common carriers, and innkeepers, the unlawfully refusing to receive and carry a passenger or goods,

1 Piggott *v.* Birtles, supra.
2 Fell *v.* Whitaker, L. R. 7 Q. B. 124.
3 Ante § 408—10.
4 Anderson *v.* N. E. Ry. Co. 9 W. R. 519.
5 Johnson *v.* Stears, 10 Jur. N. S. 99; see ante § 410.

or to receive a guest, is a mere tort, or breach of the duty imposed upon them by law. For such refusal, substantial damages are recoverable, as there is an injury to a right; and if the plaintiff has in consequence, been obliged to take a special conveyance, and incur extraordinary expenses to reach the place to which he ought to have been carried, all expenses reasonably incurred may be recovered.[1] So, as to an innkeeper, if the plaintiff has been put to expense in seeking shelter and accommodation elsewhere, and has been obliged to hire conveyances to reach it, he is entitled to recover such special damage.[2] The Court is entitled to look at all the surrounding circumstances, and at the conduct of the parties, to see where the blame rests, and assess the damages according to the way in which the parties have conducted themselves.[3]

414. In actions against agents, the measure is a full indemnity for the loss or damage to the principal; this will include what he has consequently been obliged to pay to third persons in discharge of his liability to them.[4] So, any loss, though not directly caused by, yet fairly attributable to, the wrongful act or omission, as a natural result or a just consequence, may be included;[5] and the agent may not set up the bare possibility of loss even if his wrongful act had not been done; for no wrongdoer ought to be allowed to apportion or qualify his own wrong, when a loss has actually happened, whilst his wrongful act was in operation, which is fairly attribut-

Actions against agents.

1 Hamlin *v.* G. O. Ry. Co. 1 H. & N. 408; 26 L. J. 20 Exch.; see ante § 372.

2 Addison on T. 429.

3 Davis *v.* N. W. Ry. Co. 4 Jur. N. S. 1303.

4 Story on Agency, 217, c.

5 Ibid. 218.

able to it.[1] Where the agent has neglected to remit money, ordinary interest thereon should be given, but not any possible profits that might have been made by the principal's speculating with the amount.[2] So, where he has neglected to make a certain shipment of goods by a certain ship which arrived, he will be liable for the actual loss, that is, the excess in value of the goods at the port of arrival; but not where no ship was named, for then whether or when the goods would have arrived, or what would have been the loss of profits, cannot be absolutely ascertained.[3] On loss from defective insurance, the measure is, not necessarily the amount that ought to have been insured less the premium, but only the amount of actual loss by the agent's negligence.[4] Where money has been improperly deposited by an agent with a banker, the sum so lost is the measure;[5] and where there has been a neglect to invest, as ordered, in a particular stock, and it afterwards rises, the enhanced value is the damage.[6] But there must have been a real loss, so that it will be a good defence that the order if obeyed,—as the insurance if made,—could not possibly have resulted in any benefit; much more it might be a defence to show that loss must have ensued.[7] Where there is a breach of duty, nominal damage will be presumed, if none is actually shown.[8] An agent cannot set off the gain from his superior care in other transactions.[9]

1 Story on Agency, 219; Davis *v.* Garrett, 6 Bing. 716.

2 Story on Agency, 220, 221.

3 Ibid.; Sedg. on D. 382.

4 Charles *v.* Altin, 15 C. B. 46; Mayne on D. 142—3.

5 Story on Agency, 218; Caffrey *v.* Darby, 6 Ves. 496.

6 Story on Agency, 221.

7 Ibid. 222; Mayne on D. 310; Sedg. on D. 384—5.

8 Story on Agency, 217, c.

9 Ibid. 223.

415. In actions against carriers for loss of, or injury to goods, the value of the articles is generally the measure of damages; and where the ship has never reached its destination, that value is the cost price with the shipping charges, but the insurance premium cannot be added.[1] Where the cargo has arrived, and the goods have been then lost or misdelivered, the value at the port of discharge is the proper measure;[2] but if the goods have been sold in the course of the voyage, and the ship has arrived, the measure is either the sale price, or the value at the port of discharge, whichever is the greater.[3] Where goods under a certain value are carried in one way, and more valuable ones in another, the plaintiff is concluded by his own false statement that his goods are under the limit, from recovering more than such value as damages.[4] By Section 5 of Act 3 of 1865, in case of loss of, or damage to, articles enumerated in the Act and above Rs. 100 in value, inland carriers are liable also to repay money received for the extra rate of hire.[5]

Actions against carriers.

416. In actions for deceit, it is difficult to state any more precise rule as to the measure of damages than the general one, that wherever a man wickedly asserts that which he knows to be false, and thereby draws his neighbour into a heavy loss, he is responsible for it, or for so much of the loss as was the necessary, natural, or probable and known consequences of the misrepresentation.[6] When the deceit was in regard to a sale of chattels,

Actions for deceit.

1 Parker v. James, 4 Camp. 112.

2 Brandt v. Bowlby, 2 B. and Ad. 932.

3 Campbell v. Thompson, 1 Stark. 490; Richardson v. Nourse, 3 B. and Ald. 237; 1 Arnould on Ins. 233.

4 McCance v. L. & N. W. Ry. Co. 7 Jur. N. S. 1304.

5 For cases on what damages are too remote, see ante § 372.

6 Pasley v. Freeman, 2 Sm. L. C. 74.

the rules for assessing value in actions for breach of warranty may be consulted, it being always remembered that the presence of fraud justifies more readily a presumption as to value against a wrongdoer, than where there is liability, but without fraud; and any special damage, the legal and natural consequence of the fraud, may be added to the deficiency in the value of the chattels;[1] as where the defendant fraudulently sold to the plaintiff an infected cow as sound, and five other cows of the plaintiff became infected and died, the plaintiff recovered the value of all the cows.[2] In actions against directors of a company for deceit inducing the plaintiff to purchase shares, the proper mode of measuring damages is to ascertain the difference between the purchase money paid, and what would have been a fair price to be paid for the shares, according to the true circumstances of the company at the time of the purchase.[3] In an action against one who falsely represented himself as an agent, the costs incurred by the plaintiff in bringing a suit against the supposed principal to enforce the contract, and all expenses which he properly incurred upon the faith of the contract being a valid one, may be given as damages.[4] And here, the general rule may be stated, that though the right of action for a purely personal tort causing no pecuniary loss, ceases on the death either of the party injured, or of the wrongdoer, yet, for a tort that causes damage to property, an action may be brought, either by the representatives of the deceased injured party, or against those of the deceased wrongdoer, having

Misrepresentation as to authority.

General rule as to actions by or against representatives.

1 Ante § 368.
2 Mullett *v.* Mason, L. R. 1 C. P. 559.
3 Davidson *v.* Tulloch, 6 Jur. N. S. 545.
4 Collen *v.* Wright, 7 E. & B. 301.

assets in their hands; but in either case, the measure of damages is limited to the actual loss, and the malice or motives of the wrongdoer are not to be considered.[1]

Actions against officers of a Court.

417. In actions against ministerial officers of a Court for non-arrest, or for an escape from arrest, on mesne process, the measure is the actual damage that may be shown.[2] But for non-arrest or escape on final process, at least nominal damages must be given.[3] But if the debtor had at the time, or still has, the means of paying the debt, substantial damages must be given, and generally the full amount of the debt; if he had not the means, the loss is only the security of the debtor's body, and the damages may be small.[4] The true measure is the value of the custody of the debtor at the moment of escape, and no deduction ought to be made on account of anything which might have been obtained by the plaintiff by diligence after the escape, unless indeed he has done anything to aggravate the loss, or prevent recaption.[5] Not only the debtor's own resources, but all reasonable probabilities from his position in life or surrounding circumstances that the debt, wholly or in part, would have been discharged if he had remained in custody, may be considered.[6] So, for unnecessary delay in arresting on final process, at least nominal damages may be given; but the measure of damages is the real loss sustained, and not neces-

1 Mayne on D. 291—3, 297; for the law in India, see Act 12 of 1855, which limits the period for actions, and, *semble*, differs from the English law in not limiting actions against representatives to where the injury has been to property.

2 Morris *v.* Robinson, 3 B. & C. 206.

3 Williams *v.* Mostyn, 4 M. & W. 451; Clifton *v.* Hooper, 6 Q. B. 468; 2 Hilliard, 282.

4 Arden *v.* Goodacre, 11 C. B. 371, 375; 2 Hilliard, 237.

5 Ibid.; Sedg. on D. 595 (n).

6 Macrae *v.* Clarke, L. R. 1 C. P. 403.

sarily the whole debt.[1] For the taking of insufficient security, the officer will be liable to the same extent as the sureties would have been, had he done his duty, and also for the costs of an unproductive action by the plaintiff against the sureties.[2] Some actual pecuniary damage is necessary to maintain a suit for not levying; but although, *primâ facie* the measure of damages is the value of the goods which might have been but were not levied, it may be shown that if execution had been levied, there would probably have been no benefit, as that others might have made the debtor a bankrupt.[3] For failing to levy upon a sufficiency of property to satisfy the judgment, the measure is the loss sustained. But if what was taken was what would, in all reasonable probability, be sufficient, the officer will not be liable either if it turns out deficient, or if it be in excess; all that is required of him is to exercise a sound discretion.[4] For a false return of no goods, &c. the measure is the actual loss, and some loss must be shown.[5] If the officer neglect to levy execution on property held jointly by the debtor and another, the measure would be the half value of the goods.[6]

Actions against solicitors, &c.

418. In an action against a solicitor for negligence, &c., the damages may be nominal if the action is maintainable, but no actual loss is shown.[7] When substantial damages are given, the measure is the amount of loss which the plaintiff has suffered, or is likely to suffer from the act (for a subsequent loss will not be a

1 Clifton *v.* Hooper, supra.
2 Baker *v.* Garrett, 3 Bing. 58; Plumer *v.* Brisco, 11 Q. B. 46.
3 Hobson *v.* Thelluson, L, R. 2 Q. B. 642.
4 2 Hilliard, 265, 207 (n.)
5 Wylie *v.* Birch, 4 Q. B. 566.
6 Tyler *v.* Leeds, 2 Stark. 218.
7 Godefroy *v.* Jay, 7 Bing. 413.

fresh cause of action), taking all the circumstances of the case into consideration.[1] Where a solicitor enters into a compromise against the express directions of his client, he is liable at least to nominal damages.[2] In all actions for negligence or breach of duty, the law of limitations begins to run from the occurrence of the act, and not from its discovery by the plaintiff, or from the occurrence of the consequential damage, unless fraud has been practised to conceal a knowledge of it;[3] otherwise, where the special damage constitutes the tort, the period begins to run, not from the occurrence of the act, but from the accrual of the consequent damage.[4] In an action against a witness, who has been duly summoned, for non-attendance, the measure is the actual loss, the proper and necessary consequence of his omission; this may be the costs from having necessarily procured a postponement of the trial.[5] In actions for using, in breach of good faith, information confidentially acquired, or secret inventions, the measure of damages would seem to be the actual loss sustained, and in respect to the use of secret inventions, the amount might be calculated in the same manner as where a patent invention has been pirated.[6]

—against a witness.

—for using secret information.

1 Mayne on D. 270.

2 Fray *v.* Voules, 1 E. & E. 839.

3 Howell *v.* Young, 2 B & C. 259, 268; Smith *v.* Fox, 6 Hare, 386.

4 Bonomi *v.* Backhouse, E.B. & E. 622; 7 Jur. N. S. 809; Roberts *v.* Read, 16 East, 215.

5 Needham *v.* Fraser, 1 C. B. 815; Mayne on D. 272; Act 10 of 1855, s. 10.

6 See ante § 406.

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(BY THE SAME AUTHOR,)

A TREATISE

ON THE

LAW OF INJUNCTIONS,

AND THE

APPOINTMENT OF RECEIVERS,

UNDER THE CODE

OF

CIVIL PROCEDURE,

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